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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

NO. _____

CENTRAL IOWA REFUSE SYSTEMS, INC.,

Petitioner,

vs.

DES MOINES METROPOLITAN AREA SOLID WASTE AGENCY, etc., et al.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THIS COURT'S STANDARD FOR EXEMPTING MUNICIPAL ACTIVITIES FROM THE ANTITRUST LAWS, THE PRESENCE OF A CLEARLY ARTICULATED AND AFFIRMATIVELY EXPRESSED STATE POLICY TO DISPLACE COMPETITION, IS SATISFIED BY A FINDING OF A "POSSIBLE INFERENCE" THAT THE LEGISLATURE CONTEMPLATED THE ANTICOMPETITIVE ACTIVITY COMPLAINED OF.

II. WHETHER A STATUTORY SCHEME WHICH (1) REQUIRES MUNICIPALITIES TO PROVIDE, BY MEANS NOT PROHIBITED BY LAW, FOR THE DISPOSAL OF SOLID WASTE, (2) ALLOWS MUNICIPALITIES TO JOIN TOGETHER FOR SOLID WASTE DISPOSAL PROJECTS, (3) PERMITS THE JOINTLY FORMED ENTITY TO ISSUE REVENUE BONDS TO FINANCE THE PROJECT, AND (4) GRANTS THE ISSUER SPECIFIC POWERS, NOT INCLUDING ANTICOMPETITIVE CONDUCT, TO INSURE PAYMENT OF THE BONDS, CONSTITUTES A CLEARLY ARTICULATED AND AFFIRMATIVELY EXPRESSED STATE POLICY THAT THE MUNICIPALITIES MAY PROHIBIT, AT BOND COUNSEL'S BEHEST, DISPOSAL OF SOLID WASTE AT PRIVATELY OWNED STATE-LICENSED SOLID WASTE DISPOSAL SITES COMPETING WITH THE JOINT PROJECT.

III. WHETHER ACTIVE STATE SUPERVISION IS REQUIRED OF MUNICIPAL ANTICOMPETITIVE ACTIVITY FOR SUCH ACTIVITY TO BE EXEMPT FROM THE ANTITRUST LAWS.

IV. WHETHER STATE POLICY TO DISPLACE COMPETITION MAY BE INFERRED IN THE ABSENCE OF ANY PROVISION FOR ACTIVE STATE SUPERVISION IN THE FACE OF THE IOWA SUPREME COURT'S REQUIREMENT THAT STATE SUPERVISION MUST BE PRESENT IF MUNICIPAL ANTICOMPETITIVE CONDUCT IS TO BE PERMITTED UNDER IOWA LAW.

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FOR THE EIGHTH CIRCUIT

PARTIES TO THIS PROCEEDING

Central Iowa Refuse Systems, Inc. ("CIRS") is the only plaintiff. It has no parent companies, subsidiaries or affiliates.

The Defendants are as follows: The Des Moines Metropolitan Area Solid Waste Agency, the Town of Altoona, Iowa, the City of Ankeny, Iowa, the City of Bondurant, Iowa, the City of Clive, Iowa, the City of Des Moines, Iowa, the City of

Elkhart, Iowa, the City of Grimes, Iowa, the City of Mitchellville, Iowa, the City of Johnston, Iowa, the City of Norwalk, Iowa, the County of Polk, Iowa, the City of Runnells, Iowa, the City of Urbandale, Iowa, the City of West Des Moines, Iowa, the City of Windsor Heights, Iowa and the City of Polk City, Iowa.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is officially reported at 715 F.2d 419 and is attached as Appendix "A". The opinion of the United States District Court for the Southern District of Iowa is officially reported at 557 F.Supp. 131 and is attached as Appendix "B".

JURISDICTION

The opinion of the United States District Court for the Southern District of Iowa was filed on December 9, 1982. Plaintiff filed a timely notice of appeal, appealing the decision to the United States Court of Appeals for the Eighth Circuit. The opinion of the United States Court of Appeals for the Eighth Circuit was filed on August 26, 1983, and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 15.

§ 1. Trusts, etc., in restraint of trade illegal; penalty.

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding

one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 2. Monopolizing trade a felony; penalty.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Chapter 553, Code of Iowa.

553.4 Restraint prohibited. A contract, combination, or conspiracy between two or more persons shall not restrain or monopolize trade or commerce in a relevant market.

553.5 Monopoly prohibited. A person shall not attempt to establish or establish, maintain, or use a monopoly of trade or commerce in a relevant market for the purpose of excluding

competeition or of controlling, fixing, or maintaining prices.

The other statutes involved, Chapters 455B, 28E and 28F are attached as Appendix "C". All references are to the 1981 Code of Iowa. Chapter 455B has since been internally renumbered but has not otherwise significantly changed for purposes of this case.

STATEMENT OF THE CASE

CIRS is an Iowa corporation that operated a solid waste disposal site in Madison County, Iowa, 31 miles from the central business district of Des Moines. The waste disposal site operated by CIRS was closer to many parts of the Defendant cities than is the landfill operated by the Defendants. Prior to the actions complained of here, much of the waste deposited at CIRS' landfill came from the Des Moines metropolitan area. CIRS charged its landfill users a fee based on the quantity of waste disposed.

The Des Moines Metropolitan Solid Waste Agency ("Metro") was organized in July of 1969 by the defendant cities ("cities" and "municipalities" as used herein mean all the municipal defendants and Polk County) pursuant to Iowa Code Chapter 28E and Chapter 28F. Iowa Code Chapter 28E allows various municipalities to enter into agreements and create entities to do jointly what they have the power to do separately under the laws of Iowa. Iowa Code Chapter 28F permits the joint financing of certain public works projects, including solid waste facilities, by the issuance of revenue bonds.

In 1971, Metro planned and developed a solid waste landfill ten miles east of Des Moines, and pursuant to Iowa Code Chapter 28F, issued revenue bonds to fund its development. One million, five hundred thousand dollars ($1,500,000) was raised by the sale of solid waste disposal revenue bonds, issued October 1, 1972, for the establishment of the Metro solid waste disposal facility. On May 15, 1972, the cities entered into a Solid Waste Disposal Service Contract with Metro.

In the Solid Waste Disposal Service Contract, the members of Metro and Metro agreed that so long as any bonds of the Agency ("Metro") were outstanding, the member municipalities would not grant any franchise or license to any person to compete with the Metro operation and all solid waste generated within the members' jurisdictions would be disposed of at the Metro site. Sections 105 and 701 of the Solid Waste Disposal Service Contract provide:

> Section 105. Disposal. The Municipality does hereby agree, that to the full extent permitted by law, all Solid Waste generated from within its jurisdiction shall be disposed of at the Project.

Section 701. Non-Competitive Facilities. So long as any Bonds of the Agency are outstanding, the Municipality shall not grant any franchise or license to any person, firm, association or corporation for a competing solid waste disposal system, nor shall they permit any municipal solid waste disposal system to compete with the Agency. The Municipality may, without Agency consent, dispose of construction or demolition material, tree removal residue, decrepit automobiles and other nonputrescible solid waste generated out of the Municipality's own activities, in a disposal site apart from an Agency disposal site.

The Agency however shall have the right to establish, construct and acquire any other disposal project, provided, however, that no such other disposal project shall be so established, constructed or acquired unless the Consulting Engineers shall certify that such other disposal project will not be competitive with said Project constructed and acquired pursuant to the terms of the Resolution, and will not materially or adversely affect the revenue to be derived from said Project, or the rights and security of the holders of the Bonds issued pursuant to said Resolution.

These provisions were included in the Contract solely because bond counsel had advised the Defendants that such provisions should be included to make the revenue bonds saleable.

Pursuant to the Contract, the cities passed ordinances which require haulers to dispose of all solid waste collected within the member municipality at a facility operated by Metro. Some cities made it a crime to haul solid waste to any place other than Metro's facilities. Because of the agreement and the ensuing ordinances, those persons holding permits to haul solid waste are not allowed to haul such waste from the metropolitan area to the landfill operated by CIRS. CIRS, therefore, cannot compete with the Metro landfill with respect to any solid waste generated from within the Metro environs and is deprived of the revenue it had previously received from such solid waste.

CIRS brought this action alleging that the Defendants have illegally monopolized the disposal of solid waste in violation of § 2 of the Sherman Act and Iowa Code § 553.5. CIRS further alleged that the means by which the Defendants have achieved such monopoly, illegally

tying the issuance of a hauling permit to the purchase of Metro services and enforcing a boycott against any other sanitary landfill are themselves restraints of trade and per se violations of § 1 of the Sherman Act and Iowa Code § 553.4. Jurisdiction was founded on 28 U.S.C. § 1337, 15 U.S.C. §§ 15 and 26 and the doctrine of pendent jurisdiction.

The issue of liability was argued before the Honorable Judge William Stuart on a stipulation of facts.[1] Judge Stuart entered judgment for the Defendants, finding that the cities and Metro were exempt from application of the antitrust laws for the actions complained of here. He found that both parts of the state action exemption test set forth by this Court in California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980), had been met.

The Eighth Circuit affirmed, finding that it was possible to infer from the statutory scheme a state policy permitting

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[1]By the agreement of the parties, this case was bifurcated. The issue of damages was reserved for a later trial if the court found for the Plaintiff on the question of liability.

anticompetitive practices for financing solid waste disposal sites. It further determined that the second part of the Midcal test, active state supervision, was "unnecessary where the restraint represents governmental conduct in an area of traditional municipal activity." (Appendix "A", p. 30A).

REASONS FOR GRANTING THE WRIT

1. THE QUESTIONS PRESENTED ARE SUBSTANTIAL AND SHOULD BE RESOLVED BY THIS COURT.

Governmental subdivisions are not immune as such from the antitrust laws. City of Lafayette v. Louisiana Power & Light Company, 435 U.S. 389 (1978). The Parker state action exemption, first enunciated in Parker v. Brown, 317 U.S. 341 (1943), applies only to activities of the state as sovereign or when there is a "clearly articulated and affirmatively expressed state policy to displace competition" and there is active state supervision of the activity. California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980) and Community Communications, Co. v. City of Boulder, 455 U.S. 40, 52 (1982). The question of how and when those standards

for the state action exemption apply to municipalities greatly concerns those adversely affected by cities' anticompetitive conduct, cities subject to those standards and the courts who, in conflicting opinions, have attempted to apply those standards.

When applied to cities, the "clearly articulated and affirmatively expressed" criterion may be satisfied when it is determined "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of." Lafayette, supra, 435 U.S. 389 (1978). The confusion arises, however, as to what constitutes legislative "contemplation" of anticompetitive activities. For example, must a finding of such legislative contemplation be based on a proper conclusion that the permission to act in particular anticompetitive manner necessarily inheres in the power granted? Is it enough that, if not so necessarily inherent, the permission is the most reasonable inference to draw from the nature of the granted power? Or is it enough that the inference may be permissibly (not unreasonably) drawn from the

authority granted? Because state statutory authority is most generally silent with regard to anticompetitive municipal conduct, the answer to these questions are needed to properly confine cities anticompetitive behavior within the bounds of the exemption and to protect private enterprises competing with the cities.

The Ninth Circuit has taken the position that a strict standard is required in order to show state contemplation of anticompetitive activity. In Parks v. Watson, 716 F.2d 646, 663-64 (9th Cir. 1983) the Ninth Circuit stated:

> Klamath argues persuasively that merely demonstrating a state policy to displace competition with monopoly public service does not necessarily satisfy the additional requirement that the legislature contemplate the kind of action complained of.
>
> * * * *
>
> There is nothing in Chapter 523 which would allow us to infer that any authorization by the state to displace competition with city-run geothermal districts also includes authorization for a city to undertake anticompetitive action in its efforts to establish such a district.

According to the Ninth Circuit, state authorization to undertake an activity in an otherwise unlawful anticompetitive manner does not warrant the assertion that the legislature contemplated additional anticompetitive activity. A fortiori, mere authority to act in a certain area should not constitute authorization to act in any manner violative of the antitrust laws.

On the other hand, the Eighth Circuit has adopted a loose construction for what constitutes legislative contemplation, a construction which sanctions anticompetitive conduct without any authorization whatsoever. For example, in this case, the defendant municipalities have statutory authority, and were required, to provide for the disposal of solid waste by means "not prohibited by law". Section 455B.76, Code of Iowa (1981). They had statutory authority to join together to provide for solid waste disposal facilities. Chapter 28E of the Code of Iowa. They also had a statutory authority to issue revenue bonds to pay for the construction of the solid waste project. The statutes specifically detail the means by which they were permitted to raise the

funds to pay the bonds, but did not specifically authorize monopolization or other anticompetitive conduct. Chapter 28F, Code of Iowa. The statutes also provide for no state review of the economic impact of such projects.[2] This case presents the question of whether the municipalities' requirement that, for so long as the revenue bonds were outstanding, no solid waste could be disposed of at any project other than theirs, was contemplated by this statutory scheme.

The Eighth Circuit found that "there is no statute or other authority indicating that the Iowa legislature actually contemplated that the agency responsible for construction and operation of the landfill facility would have the exclusive

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[2]It would not have been difficult for the legislature to have provided for review of the impact of anticompetitive projects on the rest of the state, if it had indeed contemplated that the municipalities would undertake conduct in restraint of trade. The municipalities are required to submit their waste disposal plans for review of health and safety factors. The legislature could easily have provided that the plans likewise be reviewed for economic impact on surrounding areas.

right to dispose of solid waste produced in the Des Moines area or would engage in practices in restraint of trade." (App. A at 21-22). The court also admitted that it was required to engage in "some speculation" (App. A at 22) to find anticompetitive intent but decided "it is possible to infer the existence of an affirmative state policy" (App. A at 22) to displace competition.

The Iowa legislature, according to the Court, placed high priority on the disposal of solid waste. It empowered the municipalities to issue revenue bonds to finance the disposal sites. The Court inferred from this that the legislature intended the city to "have the latitude necessary to impose restrictions on competition if Metro believed such restrictions necessary to promote the sale of the bonds." (App. A at 27). The court distinguished this case from the case involving a cooperative effort of cities to issue revenue bonds to build a swimming pool, which is also authorized by Chapter 28F. Unless swimming pools are deemed "high priority projects" (App. A at 28), the same chapter providing for issuing

revenue bonds would not imply anti-competitive activity to make the bonds saleable.

The essence of the court's opinion is that if cities are given authority to undertake "important" government projects which can be funded through government bonds, the cities are free to undertake any anti-competitive measures they -- or their bond counsel -- deem necessary to sell these bonds. Thus, the standard for "contemplation" of anticompetitive policies is reduced or, indeed, almost nonexistent, for "important projects," and is stricter for less weighty projects. Such a two-fold standard based on the importance of the project affords no guidance and, in fact, adds another tier of confusion to what is already a confusing area of the law.

Not only does it make little sense if the application of the exemption depends on whether the authorized activity is "important", but the Eighth Circuit's interpretation is also contrary to the teachings of this Court. This Court has recognized that even "important" projects which the state may authorize to be operated on a monopoly basis may run afoul

of the antitrust laws if the city seeks to extend its monopoly:

> They [petitioners] suggest that to apply antitrust principles to local governments will necessarily interfere with the execution of governmental programs. We do not agree. Acting as agents at the direction of the State, local governments are free to implement state policies without being subject to the antitrust laws to the same extent as would the State itself . . . . On the other hand, it would not hinder governmental programs to require that cities authorized to provide services on a monopoly basis refrain from, for example, predatory conduct not itself directed by the State.
>
> Lafayette, supra, 435 U.S. at 406 n. 31 (emphasis added).

Further, it is clear here that the impetus for the anticompetitive provisions came not from the State but from the bond consultants the Defendants had hired. The result of the lower courts' decisions is that by authorizing issuance of revenue bonds, the legislature is fictionally presumed to have authorized whatever anticompetitive conduct individual bond consultants may see fit to impose, regardless of whether such conduct in fact comports with state policy. Such attempts

to put the "state action" imprimatur on what is essentially private decision making were rejected by this Court in Cantor v. Detroit Edison Co., 428 U.S. 579 (1976), and should not be condoned in the municipal arena.

Not only does the Eighth Circuit weaken antitrust standards by giving mere lip service to the "clearly articulated and affirmatively expressed" test, but also it dilutes them even more by holding that state supervision is generally not required for municipal conduct, a question this Court has not yet decided. Boulder, supra, 455 U.S. at 51 n.14. However, if "clear articulation and affirmative expression" of state policy to displace competition require only a possible inference that that policy exists, and no state supervision at all is needed, then at no time will there be any impartial, state-wide consideration of the potential impact the municipality's action may have on the rest of the state. Without a firmer standard for expression of state policy and without a requirement of active state supervision, the economic dislocation and regional inefficiencies that

concerned this Court in Lafayette would be permitted to occur.

The gravamen of the challenge here -- the monopolization not of landfills but of solid waste itself -- is that such monopolization affects surrounding areas. The economic survival of landfills in surrounding less populous areas that were previously serving Metro residents is imperiled. Moreover, the surviving customers and owners of landfills in the surrounding areas could be forced to bear the brunt of Metro's policy through increased rates or the loss of local landfill service. It is exactly this kind of extra-territorial impact of a municipality's policy that provided the basis for the Lafayette decision. This Court was unwilling to grant an automatic state action exemption to municipalities without affirmative direction by the state because a municipality might otherwise be furthering its own parochial interests without concern for the extra-territorial impact of its conduct. This Court stated:

> But the economic choices made by public corporations in the conduct of their business affairs, designed as they are to assure maximum benefits for the community constituency, are not inherently more likely to com-

port with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders.

* * * *

The decision to displace existing service, rather than being made on the basis of efficiency in the distribution of services, may be made by the municipality in the interest of realizing maximum benefits to itself without regard to extra-territorial impact and regional efficiency.

* * * *

When these bodies [units of local government] act as owners and providers of services, they are fully capable of aggrandizing other economic units with which they interrelate, with the potential of serious distortion of the rational and efficient allocation of resources, and the efficiency of free markets which the regime of competition embodied in the antitrust laws is thought to engender. If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy

> Congress established. (Footnotes omitted).

City of Lafayette, 435 U.S. at 403-408.

The instant decision of the Eighth Circuit, contrary to Lafayette's instruction, has opened the door to market distortion and territorial aggrandizement by government subdivisions without any state involvement, input, or attention. To assume that any and all anticompetitive measures were "comprehended within the powers granted" merely because the end to be achieved is "important", to find that it is sufficient that anticompetitive measures could be "possibly inferred" from the authorized activity, and to require no state supervision renders this Court's state action cases meaningless. Astute counsel to municipalities within the Eighth Circuit's jurisdiction can justifiably reassure their clients that the probability of antitrust liability for any action they may take is negligible. Private enterprise, seeking to compete with local governments, will have no recourse for abuses of governmental power.

If Lafayette is to retain any kind of vitality and if municipalities and private enterprise are to understand its reach,

this Court should make clear how strong or tenuous must be the inference that the legislature contemplated the particular anticompetitive conduct and whether state supervision of such conduct is necessary in all events. This case invites that clarification of a matter of increasing national importance.

2. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL.

This Court has specifically left open the question of whether active state supervision is required in order for municipalities to qualify for the state action exemption. Boulder, supra, 455 U.S. at 51 n.14. This case provides a timely opportunity to answer that question.

The circuit courts have been in conflict as to whether state supervision is required for government subdivisions. The Eighth and Seventh Circuits have held that the active supervision requirement does not apply to political subdivisions, as least when those subdivisions are performing "traditional government functions." Gold Cross Ambulance & Transfer & Standby Service, Inc. v. City

of Kansas City, 705 F.2d 1005, 1014-15 (8th Cir. 1983); Hallie v. City of Eau Claire, 700 F.2d 376, 384 (7th Cir. 1983).[3] The First Circuit has required state supervision. Corey v. Look, 641 F.2d 32, 36-37 (1st Cir. 1981). So has the Ninth Circuit. Ronwin v. State Bar of Arizona, 686 F.2d 692, 697 (9th Cir. 1981), cert. granted sub nom. Hoover v. Ronwin, 103 S.Ct. 2084 (1983); Charley's Taxi Radio Dispatch Corporation v. SIDA of Hawaii, Inc., 562 F.Supp. 712, 718-19 (1983).[4] The question of whether both

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[3]The Plaintiffs in both of these cases have filed petitions for writs of certiorari. Gold Cross was filed on July 25, 1983, docket number 83-138, and Hallie was filed May 11, 1983, docket number 82-1837. As of this writing neither petition has been granted nor denied. Because this case presents questions similar to those raised in Gold Cross and Hallie, it might be appropriate for this court to consider the three cases together.

[4]Also, the Iowa Supreme Court has indicated that active state supervision is required in order to exempt municipal conduct from the reach of the Iowa Competition Law. Neyens v. Roth, 326 N.W.2d 294 (Iowa 1982). In light of this a federal court should not be able to infer a policy to displace competition in the absence of supervision of the anti-competitive conduct.

parts of the Midcal state action test apply to governmental subdivisions should be determined by this Court once and for all.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 83-1039 and 83-1107

CENTRAL IOWA REFUSE SYSTEMS, INC.,	)	
Appellant,	)	
vs.	)	APPEAL FROM THE UNITED STATES DISTRICT COURT
DES MOINES METROPOLITAN SOLID WASTE AGENCY, et al.,	)	FOR THE SOUTHERN DISTRICT OF IOWA
Appellees.	)	

Argued: June 15, 1983

Filed: August 26, 1983

Before HEANEY, Circuit Judge, GIBSON and ROSENN,* Senior Circuit Judges.

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* Honorable Max Rosenn, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

ROSENN, Senior Circuit Judge.

This antitrust case raises a difficult question concerning the "state action" exemption from the federal antitrust laws. Plaintiff Central Iowa Refuse

Systems, Inc. (CIRS) brought this action against the Des Moines Metropolitan Area Solid Waste Agency (Metro), and its constituent members, Polk County, Iowa and fifteen Iowa municipalities including the city of Des Moines (the municipal defendants). Metro operates a solid waste disposal site within the Des Moines metropolitan area, and Plaintiff CIRS operates a similar facility outside the metropolitan area. The plaintiff's complaint alleged violations of sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2, as well as Iowa antitrust law, arising out of Metro's attempt to require that all solid waste generated within the geographic area covered by Metro be disposed of at Metro's facilities.[1]

The district court held, on the basis of stipulated facts, that the defendants' activities were protected from antitrust scrutiny by the state action exemption from the federal antitrust laws, and entered judgment for the defendants. The

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[1]The plaintiff invoked the district court's jurisdiction over the federal antitrust claims pursuant to 28 U.S.C. § 1337 and over the state antitrust claims under the doctrine of pendent jurisdiction.

plaintiff now appeals from this determination.[2] We affirm.

I.

The seeds of this litigation were sown over fifteen years ago. In the mid-1960's, the city of Des Moines recognized that its municipal dump was rapidly becoming unable to accommodate the increasing quantities of refuse produced within the city. Knowing that several neighboring municipalities were experiencing similar problems, the City Manager of Des Moines proposed that the municipalities enter into a cooperative arrangement to construct adequate modern waste disposal facilities. In November 1966, the municipalities retained two consulting firms to conduct an engineering study, funded largely by a grant from the United

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[2]Certain of the defendants filed a cross-appeal, contesting the district court's preliminary determination that the activities complained of satisfied the Sherman Act's interstate commerce requirement. At oral argument this challenge was abandoned and the defendants conceded that their activities had a substantial effect on interstate commerce.

States Public Health Service.[3] The engineers' report, submitted in May 1968, recommended the formation of a single agency to manage the collection and disposal of all solid waste produced in the entire Des Moines metropolitan area. Such a cooperative effort was permitted under a newly-enacted chapter of the Iowa Code, Chapter 28E, which authorized political subdivisions of Iowa to join together to provide important and necessary services and facilities.[4] Under

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[3]The federal government had numerous financial assistance programs designed to encourage states and local governments to develop comprehensive plans for solid waste disposal. One example was the Solid Waste Disposal Act of 1965. See 42 U.S.C. §§ 6901-6987.

[4]Significantly, in May 1970, aware of the critical problem in solid waste disposal, the Iowa legislature enacted sections 455B.75-.83 for the purpose of encouraging municipalities to "provide sanitary disposal projects for the final disposition of solid wastes by their residents and, thereby, protect the citizens of this state from such hazards to their health, safety, and welfare that result from the uncontrolled disposal of solid wastes." See 1970 Iowa Legis. Serv. at 336 § 1. This statute required that municipalities establish and maintain solid waste disposal systems, and, like

Chapter 28F of the Iowa Code, enacted in 1969, such intergovernmental projects were to be financed by the issuance of revenue bonds.

In July 1969, the municipalities availed themselves of the provisions of Chapters 28E and 28F and established Metro. A formal intergovernmental cooperative agreement was executed in December 1969, expressly providing for financing of the project by revenue bonds.[5]

During 1971, Metro developed a plan for a single solid waste landfill on a site 10 miles east of Des Moines. At the same time, each of the municipalities and Metro entered into a Solid Waste Disposal Service Contract (the Service Contract) setting forth schedules of rates to be paid by the municipalities to Metro for

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(fn. 4 cont.)
Chapter 28E, provided for cooperative arrangements between governmental units.

[5]The Supreme Court of Iowa ruled that the delegation of legislative power to the municipalities and Metro under chapters 28E and 28F of the Iowa Code was proper under the Iowa constitution. Goreham v. Des Moines Metropolitan Area Solid Waste Agency, 179 N.W.2d 449 (Iowa 1970).

disposal of refuse.[6] Based on recommendations from Metro's bond consultants, the municipalities included in the Service Contract two provisions for the protection of the bondholders which would facilitate the underwriting and sale of the bonds. Section 105 of the Service Contract provided:

> Disposal. The municipality does hereby agree that to the full extent permitted by law, all Solid Waste generated from within its jurisdiction shall be disposed of at the Project.

In addition, under section 701 the Municipalities agreed that during the time the revenue bonds were outstanding, the Municipalities would not grant any license for any facility to compete with Metro.[7]

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[6]Under Section 401 of the Service Contract, each of the Municipalities agreed to adopt an ordinance prior to the execution of the Service Contract authorizing the levying and collection of rates, charges, tolls, and other fees for the services and facilities of the Metro project. Each municipality adopted such a rate ordinance.

[7]Section 701 provided in pertinent part:

> Non-Competitive Facilities. So long as any Bonds of the Agency

These provisions were included to guarantee the broadest possible financial base for Metro's activities, as a means of making the revenue bonds an attractive investment. The bond consultants believed that, in view of prevailing conditions in the financial markets, the bond issue

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(fn. 7 cont.)
are outstanding, the Municipality shall not grant any franchise or license to any person, firm, association or corporation for a competing solid waste disposal system, nor shall they permit any municipal solid waste disposal system to compete with the Agency . . . .

The Agency however shall have the right to establish, construct and acquire any other disposal project, provided, however, that no such other disposal project shall be so established, constructed or acquired unless the Consulting Engineers shall certify that such other disposal project will not be competitive with said Project constructed and acquired pursuant to the terms of the Resolution, and will not materially or adversely affect the revenues to be derived from said Project, or the rights and security of the holders of the Bonds issued pursuant to said Resolution.

would be unmarketable without these provisions.[8]

In October 1972, Metro duly issued pursuant to resolution $1,500,000 of revenue bonds to finance the construction of the landfill. This resolution constitutes a contract between Metro and the bondholders. In accordance with the Solid Waste Disposal Service Contract, it was contemplated that the funds to pay the bondholders would come out of charges to be collected for use of Metro facilities. The bonds are secured by a lien on and a pledge of the revenues derived from the operation of the Metro facility. By 1974, however, only two of the municipalities in Metro had enacted ordinances requiring that all solid waste generated within their jurisdiction be disposed of at the Metro landfill. Accordingly, in 1974 Metro obtained a declaratory judgment in Iowa District Court for Polk County

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[8]In addition, the municipalities were apprehensive that, unless future revenues could be assured, the municipalities themselves might become liable for any default by Metro in paying the bondholders. This would violate section 28F.6 of the Iowa Code, which required the cooperative project to be self-supporting.

construing the exclusivity provisions in sections 105 and 701 of the Service Contract to require "that all solid waste within the territorial boundaries of the City of Des Moines . . . be transported to the [Metro] site . . . until such time as the bond obligations of [Metro] are retired," and requiring that all transfer stations within the Des Moines area deposit all solid waste at the Metro landfill. As a result of this litigation, most of the constituent municipalities passed ordinances requiring persons collecting solid waste to bring the refuse to Metro's landfill or to other waste transfer stations for subsequent hauling to the Metro landfill. In addition, some members of Metro passed ordinances making it a crime to take solid waste produced within the jurisdiction to any place other than Metro's facilities.

Plaintiff CIRS is in the business of operating waste collection and disposal services in central Iowa. Until 1980, as part of this business, it operated a sanitary landfill in Madison County, 31 miles from the Des Moines central business district and outside the metropolitan area covered by Metro. CIRS brought this

action in January 1979, ten years after the formation of Metro and over six years after the revenue bonds were issued. CIRS claimed that because of the exclusivity provisions of the Service Contract, CIRS and other persons collecting refuse within the area covered by Metro were not allowed to dispose of that refuse at the landfill operated by CIRS in Madison County. The plaintiff argued that this provision prevented CIRS from competing with Metro in the disposition of solid waste, and thus amounted to a restraint of trade in violation of federal and state antitrust laws.[9] CIRS also accused Metro and the

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[9]In its brief to the district court, plaintiff explained:

> CIRS does not challenge the establishment of the Metro facility. It does not dispute the municipalities' powers to regulate the disposal of refuse and garbage, either pursuant to the municipal police power to promote and preserve the welfare and convenience of the people (citation) or pursuant to statutory mandate (citation). It does not challenge the municipalities ability to jointly exercise their powers to provide for joint facilities,

municipalities of monopolizing and attempting to monopolize the disposal of solid waste. The district court found it unnecessary to consider the question of liability, believing that the alleged anticompetitive arrangement was protected by the state action exemption to the federal antitrust laws.

II.

The state action antitrust exemption had its origin in Parker v. Brown, 317

(fn. 9 cont.)
including sanitary disposal projects.

> What CIRS does challenge here is the defendants' method of insuring the economic success of its project by destroying competition; i.e., requiring that, as long as the bonds are outstanding, all solid waste generated from within the Metro area be deposited at the Metro site, and the enforcement of that anti-competitive activity by way of permits and criminal ordinances. Such conduct obviously cannot be justified as a proper exercise of the Defendants police power since the requirement is not tied to a health or welfare concern but rather to a financial one.

U.S. 341 (1943). In Parker, the Supreme Court held that the federal antitrust laws did not prevent the state of California from instituting a marketing program for raisins. Although such a program might well have been a violation of the Sherman Act if it had been privately run, the Court held that the state's involvement exempted the program from antitrust scrutiny. Explaining that the State of California, "as sovereign, imposed the restraint as an act of government," id. at 352, the Court stated that the Sherman Act "must be taken to be a prohibition of individual and not state action." Id.

The Parker decision rested on basic principles of federalism. The Court determined that neither the express language nor the legislative history of he Sherman Act evidenced an intention on the part of Congress to restrain state action. Id. at 350. The Court therefore applied the general presumption against federal preemption of state law, explaining that "[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to

nullify a state's control over its officers and agents is not lightly to be attributed to Congress." Id. at 351.

The Parker decision raised more questions than it answered. One of the most important of these questions was whether the antitrust exemption for "state action" encompasses actions by subordinate governmental entities, such as cities. The Court finally addressed this issue five years ago in City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978). City of Lafayette involved a claim under the Sherman Act by a private utility company against several Louisiana cities, challenging various anticompetitive practices in the operation of the cities' own electric utility systems. The Supreme Court rejected the defendants' contention that municipalities, like states, are automatically exempt from the strictures of the federal antitrust laws. In a plurality opinion for four members of the Court, Justice Brennan wrote that the municipalities could not avail themselves of the state action exemption for the simple reason that cities are not states.

> Cities are not themselves sovereign; they do not receive all the federal deference of the States that create them.

> Parker's limitation of the exemption to "official action directed by the state" is consistent with the fact that the States' subdivisions generally have not been treated as equivalents of the States themselves. In light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws, we are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach.

435 U.S. at 412-13 (footnote and citations omitted).[10]

Despite its unwillingness in City of Lafayette to equate municipal action with state action, the plurality observed that a municipality could invoke the Parker doctrine in situations where the challenged conduct genuinely reflected state policy. The plurality emphasized that the Parker doctrine exempts "anticompetitive

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[10] In a concurring opinion, Chief Justice Burger developed the theory that municipal conduct should be subject to antitrust strictures if it was "proprietary" in nature but not if it was "governmental" in nature. See 435 U.S. at 418.

conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service." Id. at 413. Although there must be a "clearly articulated and affirmatively expressed" state policy decision behind anticompetitive conduct by municipalities, see id. at 410, the plurality made it clear that such a policy statement need not be a legislative directive to engage in anti-competitive actions, nor even a detailed authorization. "[A]n adequate state mandate for anticompetitive activites of cities and other subordinate governmental units exists when it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.'" 435 U.S. at 415 (footnote omitted) (quoting City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, 434 (5th Cir. 1976)). The state must have had some expectation that the municipality would engage in economic regulation of the particular area, but it

need not specifically have directed the municipality to act in a certain way.[11]

The Court again considered the matter of state action immunity for municipalities in Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982). In Community Communications, a majority of the Court endorsed the analysis of the plurality opinion in City of Lafayette, stating that the anticompetitive restraint imposed by the City of Boulder (an ordinance placing a moratorium on the expansion of cable television) "cannot be exempt from antitrust scrutiny unless it constitutes the action of the State of Colorado itself in its sovereign capacity, or unless it constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy." Id. at 52 (citations omitted). The Court held that a "home

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[11]State authorization can perhaps be inferred from concurrent state acts evincing a policy favoring regulation or from a delegation of authority to a municipality to act in an area which has customarily been regulated in an anticompetitive manner. See Note, The Application of Antitrust Laws to Municipal Activities, 79 Colum. L. Rev. 518, 523 (1979).

rule" provision in the Colorado constitution granting autonomy to municipalities with respect to local matters did not constitute the "adequate state mandate" necessary to invoke the Parker exemption.

> [P]lainly the requirement of "clear articulation and affirmative expression" is not satisfied when the State's position is one of mere neutrality respecting the municipal actions challenged as anticompetitive. A State that allows its municipalities to do as they please can hardly be said to have "contemplated" the specific anticompetitive actions for which municipal liability is sought. Nor can those actions be truly described as "comprehended within the powers granted," since the term, "granted," necessarily implies an affirmative addressing of the subject by the State. The State did not do so here: The relationship of the State of Colorado to Boulder's moratorium ordinance is one of precise neutrality . . . . [I]n Boulder's view, it can pursue its course of regulating cable television competition, while another home rule city can choose to prescribe monopoly service, while still another can elect free-market competition: and all of these policies are equally "contemplated," and "comprehended within the powers granted." Acceptance of such a proposition -- that the general

> grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances -- would wholly eviscerate the concepts of "clear articulation and affirmative expression" that our precedents require.

Id. at 55-56 (emphasis in original). Thus, it is clear after Community Communications that conduct of a subordinate governmental entity will not fall within the Parker state action exemption unless the State plays an affirmative role by, at the very least, providing the impetus for the anticompetitive activity.

Recently, this circuit has analyzed the Parker doctrine in terms of two requirements for immunity for municipal conduct. First, the state legislature must have authorized the challenged municipal activity. Second, and more important, the legislature must have intended to displace competition with regulation or some form of monopoly public service. See Gold Cross Ambulance & Transfer & Standby Service, Inc. v. City of Kansas City, 705 F.2d 1005, 1011 (8th Cir. 1983).

III.

In the instant case, plaintiff CIRS challenges the requirement imposed by Metro and the defendant municipalities that as long as the revenue bonds are outstanding, all solid waste produced within the Metro area is to be deposited at the Metro landfill. Plaintiff does not challenge either the establishment of Metro or the power of the municipalities jointly to regulate the disposal of refuse in the Des Moines metropolitan area. Plaintiff's claim is that Metro acted illegally in attempting to monopolize the disposal of solid waste produced in the Des Moines area and preventing the depositing of refuse at CIRS' landfill in Madison County.

Thus, the question is whether this alleged anticompetitive activity by Metro constitutes action "in furtherance or implementation of clearly articulated and affirmatively expressed state policy." Community Communications Co. v. City of Boulder, supra, 455 U.S. at 52. We must ascertain whether the Iowa legislature authorized the challenged activity and, if so, whether it did so with an intent to displace competition. See Gold Cross

Ambulance v. City of Kansas City, supra; P. Areeda, Antitrust Law ¶ 212.3a, at 53 (1982 Supp.).

It cannot be denied that in the 1970's the Iowa state legislature made a deliberate policy decision to encourage the construction of sanitary landfills by local governments. Under the provisions of Chapter 455 of the Iowa code, the cities and counties of Iowa are required to provide for environmentally safe and sanitary disposal of solid waste. See Iowa Code §§ 455B.76-.84[12] This statute authorizes cities and counties to join together, pursuant to the provisions of Chapter 28 of the Iowa Code, to provide common disposal facilities.[13]

It is also clear that the Iowa legislature contemplated that such joint undertakings of municipalities under Chapter 28

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[12]These sections, however, do not require that the cities and counties actually establish and operate such facilities themselves. The municipalities could have complied with their statutory obligation by contracting with private parties.

[13]The statute also provides for administrative supervision and regulation of disposal facilities by the Iowa Environmental Quality Commission.

would be financed through the issuance of revenue bonds. See Iowa Code, Chapter 28F. The bonds were to be repaid out of the revenues derived from operation of the facility. Section 28F.5 specifically provides, in pertinent part:

> Such an entity shall have the power to fix . . . fees, rentals or other charges and collect the same from the public agencies participating in the agreement . . . for the payment of the services and facilities provided by said project . . . . Such . . . fees, rentals or other charges shall be so fixed, established and maintained and revised from time to time whenever necessary as will always provide revenues sufficient to pay the cost of . . . operating the project . . . to pay the principal of and interest on the bonds then outstanding . . . [and to provide certain reserves and provide for repairs].

In addition, section 28F.6 expressly states that the revenue bonds are not to be general obligation bonds of any public agency, but are to be secured by and repaid out of the revenues realized from the project.

Nonetheless, there is no state statute or other authority indicating that the Iowa legislature actually contemplated

that the agency responsible for construction and operation of the landfill facility would have the exclusive right to dispose of solid waste produced in the Des Moines area or would engage in practices in restraint of trade. Plaintiff argues that because the anticompetitive provisions were included in the Service Contract only to ensure the financial success of the Metro Project, and not for any public health or welfare reason, the restriction on competition in disposal services was not within the scope of the activities authorized by Iowa legislation.

Admittedly, one must engage in some speculation to determine whether the State of Iowa genuinely intended to displace competition in the disposal of solid waste. We agree with the district court, however, that notwithstanding the statutes' silence on the specific matter of monopolization, it is possible to infer the existence of an affirmative state policy permitting anticompetitive practices in the operation of municipal landfills.

An examination of the statutory provisions behind Metro's formation reveals that the Iowa legislature placed

an extremely high priority on the activities of Metro and other inter-governmental agencies engaged in the disposal of solid waste. The comprehensive statutory scheme makes clear that the Iowa legislature encouraged cities and counties to join together to provide facilities for the disposal of solid waste. Moreover, the provisions of Chapter 455B, enacted in 1970, require every city and county in Iowa to provide for sanitary disposal facilities. The reasonable and perhaps even inescapable conclusion from this statutory scheme is that the legislature desired agencies such as Metro to have broad discretion to do whatever was necessary to ensure their success.

CIRS insists, however, that there is no basis for concluding that the Iowa legislature contemplated that Metro would monopolize the disposal of solid waste produced within the Des Moines area. Plaintiff emphasizes that the Iowa statutes did not impose on local governments any obligation to construct their own landfills. Although the municipalities were required to provide for the establishment of solid waste disposal facilities, they had the option of doing

so by contracting with private enterprise. Plaintiff points to Community Communications, supra, in which the Supreme Court held that "a State that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions for which municipal liability is sought." 455 U.S. at 55.

We believe the instant case is not controlled by Community Communications because the State's position here is not "one of mere neutrality respecting the municipal actions challenged as anticompetitive." 455 U.S. at 55. As we recently pointed out in Gold Cross Ambulance v. City of Kansas City, supra, 705 F.2d at 1013-14, the city's anticompetitive cable television ordinance in Community Communications was passed pursuant to a home rule provision in the Colorado constitution that failed even to refer to cable television. There was no indication of any Colorado legislative policy regarding this industry; the State simply had never considered the matter. See 455 U.S. at 55. By contrast, in the instant case, as in Gold Cross Ambulance, supra, the State of Iowa has affirmatively addressed the

matter regulated by the municipalities. Indeed, the legislature has gone so far as to express its support for those municipalities electing to cooperate in the construction of common refuse facilities. Thus, although the State has left Iowa municipalities with a range of options concerning how best to provide for sanitary disposal facilities, by no means has the state adopted an approach of indifference of "mere neutrality." See also Town of Hallie v. City of Eau Claire, 700 F.2d 376 (7th Cir. 1983). The State obviously has been very much concerned with the problem of state-wide solid waste disposal.

Plaintiff argues, however, that it requires an unwarranted leap to conclude that the state legislature actually contemplated the imposition of restrictions on competition in the disposal of solid waste in order to promote the financial viability of projects such as Metro. Chapter 28F.5 authorizes entities such as Metro to set rates, fees, and charges to insure sufficient revenue to pay for the bonds. Plaintiff asserts that the legislature may have expected that this power alone would be sufficient to guarantee the

financial viability of the project. Thus, even assuming Metro's bond consultants were correct in their opinion that the revenue bonds would not be marketable without the anticompetitive provisions in the Service Contract, plaintiff argues that there is no indication that the state legislature considered such a step necessary to ensure the financial viability of Metro.[14]

We believe that the Iowa legislature did indeed contemplate these restrictions on competition. Chapter 28F expressly authorizes municipalities to finance collective projects by issuing revenue bonds. When ascertaining what was in the minds of the legislators, we cannot ignore the realities of the municipal bond market in the mid 1970's. The legislature surely realized the importance of assuring a source of repayment in order to make the bonds marketable. Common sense and

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[14]Plaintiff also points out that the constituent municipalities in Metro could guarantee the financial stability of the agency by assessing a fee on all property owners in the area. This would eliminate the need for any monopoly of the disposal of solid waste, and would be permissible, since the activities of Metro involve the public health and welfare.

experience suggest that the Iowa legislature must have intended Metro to have the latitude necessary to impose restrictions on competition if Metro believed such restrictions necessary to promote the sale of the bonds. The bond experts had convinced Metro that the restrictions were essential for marketing the bonds. In short, even though the legislation does not speak to the precise question whether restraints of trade could be employed to guarantee the financial vitality of Metro, the comprehensive legislative scheme favoring the development of solid waste facilities demonstrates that the legislature intended the localities to have broad authority to act in furtherance of the legislative mandate.[15] Thus, we believe that the restraint on competition was a "necessary or reasonable consequence" of engaging in the authorized

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[15] Indeed, this conclusion is strengthened by the Iowa Supreme Court's interpretation that Chapter 28E and 28F authorize the issuance of revenue bonds and the use of restrictions on competition to protect the liquidity and merchantability of the bonds. See Goreham v. Des Moines Metro Area Solid Waste Agency, supra, 179 N.W.2d at 457-58.

activity of constructing a waste disposal facility with funds raised by revenue bonds. See Gold Cross Ambulance v. City of Kansas City, supra, 705 F.2d at 1013; Areeda, Antitrust Immunity for "State Action" After Lafayette, 95 Harv. L. Rev. 435, 446 (1981).

The instant case is distinguishable from a case involving, for instance, a cooperative effort among governmental subdivisions to construct a recreational swimming pool. Without evidence that a state legislature considered such a swimming pool to be a high priority project, we would be unwilling to infer that the unauthorized anticompetitive actions of local governments were within the contemplation of the legislature. In this modern era, however, the construction of solid waste disposal facilities is an essential governmental activity, and the

obvious importance that the Iowa legislature placed on projects such as Metro justifies a broad interpretation of what the legislature must have contemplated. Thus we believe that metro initiated its anticompetitive conduct pursuant to state policy, and such conduct is exempt from the federal antitrust laws under the Parker doctrine.

IV.

Plaintiff contends that, even if the restriction on disposal of refuse generated within the Des Moines area was pursuant to a clearly articulated and affirmatively expressed state policy, as required by City of Lafayette and Community Communications, supra, the defendants' anticompetitive conduct is still not immunized from antitrust scrutiny because it was not actively supervised by the state itself.

Where private parties claim the benefit of the state action exemption, they are required to show active state supervision of the challenged restraint. See California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 104-06 (1980). See also City of Lafayette v. Louisiana Power & Light Co., supra, 435 U.S. at 410; Cantor v. Detroit Edison Co., 428 U.S. 579 (1976). The Supreme Court has not decided whether this active supervision requirement also applies to anticompetitive activities of municipal governments. See Community Communications Co. v. City of Boulder, supra, 455 U.S. at 51 n.14. This circuit, however, has recently held that a showing of state supervision is unnecessary where the restraint represents governmental conduct in an area of traditional municipal activity. Gold Cross Ambulance & Transfer & Standby Service, Inc. v. City

of Kansas City, supra, 705 F.2d at 1014-15. Accord Town of Hallie v. City of Eau Claire, supra, 700 F.2d at 383-84 (7th Cir. 1983). Metro's refuse disposal operations were within a well defined area of traditional municipal activity and thus we need not address the district court's reasoning that the supervision exercised by the State of Iowa over the activities of Metro was sufficient to satisfy the requirements of the state action exemption set forth in California Retail Liquor Dealers Association v. Midcal Aluminum, supra.[17]

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[17] In view of the district court's dismissal of the federal antitrust claims, dismissal of the pendant state antitrust claims was warranted.

Accordingly, the judgment of the district court dismissing the plaintiff's complaint is affirmed.[18]

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[18] Relying upon National League of Cities v. Usery, 426 U.S. 833 (1976), and Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981), the defendants have also argued that, even apart from the Parker exemption, their activities are protected from antitrust scrutiny by the tenth amendment to the United States Constitution. Because we hold that the Parker exemption applies, there is no need for us to consider the defendants' constitutional argument. It should be noted, however, that once the revenue bonds have been retired, the legislative justification for the anti-competitive provisions will disappear. If the ordinances are still in effect and plaintiff chooses to challenge them at that time, the Parker exemption might no longer be available to Metro.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CENTRAL IOWA REFUSE SYSTEMS, INC.,	)	
Plaintiff,	)	CIVIL NO. 79-32-1
vs.	)	
DES MOINES METROPOLITAN AREA SOLID WASTE AGENCY, et al.,	)	RULING AND ORDER
Defendants.	)	

Plaintiff, Central Iowa Refuse Systems, Inc. (CIRS) brought this action against the Des Moines Metropolitan Area Solid Waste Agency (Metro) and the 15 municipalities and Polk County, which constitute its membership, alleging violations of Sections 1 and 2 of the Sherman Act, The State of Iowa antitrust laws and the Iowa and United States Constitutions. Metro was formed by the defendants under federal and state law to provide a sanitary landfill to dispose of the solid waste generated in Polk County, Des Moines and other municipalities in the Des Moines metropolitan area. All defendants will be

referred to collectively as "municipalities" unless individual identification is necessary.

Plaintiff clearly and succinctly identifies particular conduct of which it complains as follows:

> CIRS does not challenge the establishment of the Metro facility. It does not dispute the municipalities' powers to regulate the disposal of refuse and garbage, either pursuant to the municipal police power to promote and preserve the welfare and convenience of the people (citation) or pursuant to statutory mandate (citation). It does not challenge the municipalities ability to jointly exercise their powers to provide for joint facilities, including sanitary disposal projects.
>
> What CIRS does challenge here is the defendants' method of insuring the economic success of its project by destroying competition; i.e., requiring that, as long as the bonds are outstanding, all solid waste generated from within the Metro area be deposited at the Metro site, and the enforcement of that anticompetitive activity by way of permits and criminal ordinances. Such conduct obviously cannot be justified as a proper exercise of the Defendants police power since the requirement is not tied to a

health or welfare concern but rather to a financial one.

The liability issue has been submitted to the Court upon stipulated fact, written briefs and oral argument. Although several issues have been presented to the Court, it is only necessary to consider the issues of jurisdiction and state action.

FACTS

Prior to the existence of Metro, Des Moines and the metropolitan area surrounding it located in Polk and Warren Counties had encountered problems with the management of solid waste. Des Moines and other governmental units hired consulting engineers to conduct a study of the collection and disposal of solid waste in the area. The report, made in 1968 (1968 Report), recommended, among other things, the formation of a metropolitan solid waste agency for the collection and disposal of all solid waste produced in the study area to be financed by revenue bonds.

Consequently, Metro was established in July of 1969 under Chapters 28E and 28F of the Code of Iowa. In December 1969 Metro members adopted a document entitled

"Amended and Substituted Intergovernmental Agreement Creating the Des Moines Metropolitan Area Solid Waste Agency". Metro entered into the Solid Waste Disposal Service Contract with each of the municipalities.

In 1971 Metro planned and developed a solid waste landfill 10 miles each of Des Moines, and pursuant to Chapter 28F of the Code of Iowa, issued revenue bonds to fund its development. The revenues were to come from charges collected upon entry to the landfill disposal sites and charges to be collected from the municipalities.

The contract payments described in the Solid Waste Disposal Service Contract are municipal obligations as defined in the Intergovernmental Agreement. Under the provisions of Section 401 of the Service Contract and to provide a method by which its requirements could be met, the municipalities agreed that each one would adopt an ordinance prior to the execution of the Service Contract authorizing the levying and collection of rates, charges, and tolls for the services and facilities of the disposal project.

Such rate ordinances were adopted by each member of the agency. Under the

ordinances each member agreed that the charges would be sufficient to provide for the members' proportionate share of (1) operation and maintenance expenses for said disposal facilities, (2) the principal and interest on the Solid Waste Disposal Revenue Bonds, and (3) all reserves, renewal and replacement funds and other funds provided for in the resolution authorizing the issuance of the Bonds.

Each ordinance further provides that such charges, rates, and tolls would be put into effect whenever necessary in order for the member to comply with the provisions of its solid waste disposal service contract. Each ordinance also provides that the member may in its discretion apply such other lawfully available monies it has on hand for such purpose.

The consultants to the agency advised the municipalities that the financial markets at the time required, as a condition to the underwriting and marketing of said bonds, that the following language be included in the Solid Waste Disposal Service Contract entered into between

Metro and its members for the protection and security of the bondholders:

> Section 105. Disposal. The municipality does hereby agree, that to the full extent permitted by law, all Solid Waste generated from within its jurisdiction shall be disposed of at the Project.
>
> Section 701. Non-Competitive Facilities. So long as any Bonds of the Agency are outstanding, the Municipality shall not grant any franchise or license to any person, firm, association or corporation for a competing solid waste disposal system, nor shall they permit any municipal solid waste disposal system to compete with the Agency. The Municipality may, without Agency consent, dispose of construction or demolition material, tree removal residue, decrepit automobiles and other nonputrescible solid waste generated out of the Municipality's own activities, in a disposal site apart from an Agency disposal site.
>
> The Agency however shall have the right to establish, construct and acquire any other disposal project, provided, however, that no such other disposal project shall be so established, constructed or acquired pursuant to the terms of the Resolution, and will not materially or adversely affect the revenue to be derived from

said Project, or the rights and security of the holders of the Bonds issued pursuant to said Resolution.

Without the provisions of Section 105 and 701 of the contract the consultants represented to Metro that the revenue bonds would not be marketable because revenues could not be assured (predicted). In the event of default of payment under the bonds the member cities become liable for any default.

The Bonds were issued pursuant to a resolution adopted by the Agency. The principal and interest on the bonds issued pursuant to this Bond Resolution are to be paid solely from the net revenues derived by the Agency from the operation of the Project and the gross revenues to be derived from the Project will be first utilized to pay all costs of the operation and maintenance of the Project.

The Resolution, and any subsequent resolution amending or superseding the resolution, is a contract between Metro and the bondholders; and the covenants and terms of the resolution are for the protection and security of the bondholders. The bonds are secured by a lien on and a pledge of the revenues derived from the

operation of said project. The restrictions enumerated in the paragraphs above need be in force only as long as the bonds are outstanding.

Some member entities of Metro have passed ordinances making it a crime to take solid waste from the environs of the member entities to any other place other than Metro's facilities.

Ordinance No. 9137 of the City of Des Moines requires persons hauling solid waste to obtain a permit to do so and requires such permitees to haul all solid waste either to Metro's facilities or to a solid waste transfer station licensed by the City of Des Moines, which must then be hauled to the Metro facility.

Norwalk, Polk City, Runnells and Polk County have no ordinances or laws requiring solid waste collected within their boundaries to be disposed of at the Metro Solid Waste Landfill. All of the other members have ordinances which require that all persons hauling solid waste from within their respective City limits obtain a permit to do so and further requires that all such permittes must haul all solid waste to Metro's facilities. Because of the ordinances adopted by the

municipalities, those persons holding permits to haul solid waste are not allowed to haul refuse from the metropolitan area to the sanitary landfill formerly operated by the CIRS in Madison County, which is outside of the metropolitan area.

JURISDICTION

All of the defendants except the City of Des Moines argue that this Court lacks jurisdiction of any federal antitrust claims because CIRS has failed to plead and prove that the municipalities activities are either (1) in interstate commerce, or (2) that it has an effect on interstate commerce.

Although the complaint does not make such allegations specifically, the Court is of the opinion that the allegations of Counts I and II are sufficient to place the defendants on notice that plaintiff is claiming the defendants' activities placed unreasonable restraint on interstate commerce. Said defendants' motion to dismiss the action for lack of jurisdiction for failure to plead the jurisdictional requirement of interstate commerce should be and is denied.

To establish jurisdiction the plaintiff must proceed to demonstrate by submission of evidence that the defendants' activities are interstate commerce or if the activities are local in nature that they have a substantial effect on some other appreciable activity in interstate commerce. McClain v. Real Estate Bd. of New Orleans, 444 U.S. 232, 242 (1980). The breadth of the Sherman Act corresponds with the broad reach of the Commerce Clause. Ibid p. 241.

Defendants' primary reliance is placed on Heille v. City of St. Paul, 512 F. Supp. 810 (D. Minn. 1981) which was affirmed by the Court of Appeals at 671 F. 2d 1134 (8th Cir. 1982). In that case the City, by ordinance, entered the solid waste collection business in 1971. The rates established by the ordinance and the subsidies to widows, senior citizens and low income families resulted in losses that were made up by the general revenue taxes. The action, claiming defendant's predatory pricing practices caused plaintiff to lose many customers, was filed in January 1980. The City terminated its solid waste collection business in March of 1980.

The narrow issue before Judge Devitt was "whether the fact that the tolls of defendant's trade, as opposed to its product or service moves in interstate commerce is sufficient to meet the 'incommerce' or 'effecting commerce' jurisdictional prerequisite of the Sherman Act.'" Heille, 512 F. Supp. at 812. Judge Devitt held that such fact did not provide the necessary interstate nexus. The Eighth Circuit Court of Appeals affirmed under the relevant cases and the whole record. Heille, 671 F. 2d at 1137.

The record before the Court here, in addition to showing extensive purchase of equipment and supplies that had moved in interstate commerce also shows the following:

1. Congress considers the disposal of solid waste a national problem and passed legislation to furnish financial, and technical assistance and leadership to states, regional and local agencies in dealing with problems involving solid waste. 42 U.S.C. § 6901 et seq.; House Report, Resource Conservation and Recovery Act of 1976, P-L 94-580 1976 U.S. Code & Adm. News 6247.

2. The preparation of the 1968 Report which recommends the formation of Metro was funded in major part by HEW Grant No. 1-D01-V1-00060-01 from the U.S. Public Health Service, Department of Health, Education and Welfare.

3. Out of state counsel, consultants, and engineers earning fees of nearly $170,000 were involved in the Metro project.

4. At least $230,000 worth of revenue bonds issued to finance the Metro project were sold to out-of-state dealers.

5. The alleged anti-competitive activities are directly connected with the salability of the revenue bonds.

The Court is of the opinion that the record shows a sufficient basis for satisfying the Acts jurisdictional requirements under the "effect-on-commerce" theory. Defendants are not in a very good position to argue that their activities do not affect interstate commerce when they have relied for assistance and leadership on a federal act that would be unconstitutional if it is not authorized by the Interstate Commerce Clause.

The Court holds that the defendants' motion to dismiss the federal anti-trust

claims for lack of jurisdiction should be and it is hereby denied.

STATE ACTION

Parker v. Brown, 317 U.S. 341, 350-352 (1943) recognized that Congress did not intend for federal antitrust laws to restrain a state or its officers from pursuing anticompetitive activities directed by the legislature. The "state action" exemption has been subject to considerable attention by the Supreme Court in recent years.[1] Here we are concerned with its application to municipalities and other subdivisions of the State. Governmental subdivisions are not automatically afforded the "state action" exemption. LaFayette v. Louisiana Power and Light, 435 U.S. 387, 410 (1978). However a state may properly direct or

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1 Community Communications Company, Inc. v. City of Boulder, 50 L.W. 4144; California Liquor Dealers Assn v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); New Motor Vehicle Bd. of Cal. v. Orrin W. Fox, 439 U.S. 96 (1978); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978); Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Canter v. Detroit Edicson Co., 428 U.S. 579 (1976); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

authorize its instrumentalities to act in a way which would be inconsistent with antitrust laws, if such action did not reflect the state's policy. Ibid. p. 417. The evidence must show that the conduct engaged in as an act of government was pursuant to a state policy to displace competition with regulation or a monopolistic public service, Ibid. p. 413, which has been clearly articulated and affirmatively expressed. Ibid. p. 410 and Community Communications Co. v. City of Boulder (Supreme Court Jan. 13, 1982) 50 L.W. 4144, fn. 14. An adequate state mandate for anticompetitive activities exists when it is found from the authority given a governmental entity to operate in a particular way that the legislature contemplated the kind of conduct or activity complained of. LaFayette, 435 U.S. at 415.

The only aspect of the actions and conduct of these defendants that plaintiff challenge is the requirement that all solid waste generated from the Metro area is to be deposited at the Metro site:

> CIRS' claim is based on the illegal means by which the Defendants sought to insure the economic viability of this project: by illegally extending

> whatever monopoly may have been authorized by the legislature to only monopolize landfill sites within the county, to also monopolize the disposal of all solid waste generated within the county so that no one could compete with the Metro landfill.

Plaintiffs Reply Brief, August 2, 1982.

The issue is whether the state statutes authorizing or directing such conduct meet the "clearly articulated" and "state supervision" standards so that it can be found that such conduct was within the contemplation of the legislature. There is nothing in the underlying federal legislation 42 U.S.C. § 6901 et seq. which expressly envisions or directs monopolistic practices in solid waste disposal projects. Nor is there anything in the state laws that specify that public agencies shall have the right to dispose of all solid waste generated within their borders or even that anticompetitive conduct in general is condoned. The Court agrees with the following statement from Antitrust Immunity for "State Action" after LaFayette by Phillip Areida, 95 Harv. L.Rev. 435, 445-446:

> LaFayette does not require that governmental acts be 'compelled' or supervised by the state. Rather, it demands that

> the legislature have authorized the challenged activity with an intent to displace the antitrust laws. Unfortunately, state statutes seldom speak with clarity on either matter. In practice, therefore, express statements of authority or intent cannot be required. The Supreme Court has found it sufficient that the legislature contemplated the kind of action complained of. A policy to displace the antitrust laws will then be inferred if the challenged restraint of competition is a necessary and reasonable consequence of engaging in the authorized activity.

The Court must therefore look to the authority granted by the state laws. Involved are Chapter 455 B, particularly sections 455B.75 through 455B.84, and Chapter 28E and 28F of the Code of Iowa. Under the statutory scheme every city and county in the state was mandated to provide a sanitary disposal facility for final disposal of the solid waste of its residents. The cities and counties were authorized and encouraged to join together to provide a common facility. They were empowered to create a new corporation and political subdivision to acquire, construct, own and operate such sanitary disposal facility. Such new entitity was

empowered to finance the acquisition and construction of such facility by issuing revenue bonds to be repaid solely from the revenues derived from the operation of the facility. Section 28F.5 provides in part as follows:

> Such an entity shall have the power to fix, establish and maintain such rates, tolls, fees, rentals or other charges and collect the same * * * for the payment of the services and facilities provided by said project or projects. Such rates, tolls, fees, rentals and other charges shall be so fixed, established and maintained and revised from time to time whenever necessary as will always provide revenues sufficient to pay the costs of maintaining, repairing and operating the project or projects, to pay the principal and interest on the bonds then outstanding. [And to provide certain reserves.]

Section 28F.6 provides that the bonds shall not in any respect be general obligation bonds of any public agency. In Goreham v. Des Moines Metropolitan Area Solid Waste Agency, 179 N.W. 2d 449, (1970), the Supreme Court of Iowa upheld the right of Metro to issue revenue bonds for the purposes set forth in the statutes. It also held that the munici-

palities could not pay the charges levied against them from general revenues or by a property tax assessment.

The only feasible way in which solid waste facilities could be acquired and constructed was through the issuance of revenue bonds. As the legislature enacted a comprehensive scheme to authorize and encourage the issuance of such bonds, it obviously contemplated that revenue bonds would be issued. As the legislature mandated that fees and charges be levied to pay such bonds as well as operate and maintain the facilities, it must have intended for the agencies to do what was necessary to assure the revenues, including the enactment of anticompetitive ordinances and regulations. The agencies were informed that the challenged action was necessary to make the revenue bonds salable. The anticompetitive provisions are for the protection of the bondholder.

In the Court's opinion the action taken by the defendants is the kind of action that the legislature must have contemplated when it mandated its subdivisions to provide facilities for the disposal of solid waste and authorized the issuance of revenue bonds to finance the

acquisition and construction of such facility. The Court concludes that the agencies inn requiring solid waste from the Metro area to be deposited at its landfill site so long as there are revenue bonds outstanding is acting pursuant to the state policy to displace competition with regulation and a monopolistic form of public service. The action complained of is a necessary and reasonable consequence of the authority and direction given the State's subdivisions by the Iowa Legislature. Cf: New Motor Vehicle Bod. of Cal. v. Orrin W. Fox Co., supra; Gold Cross Ambulance, 538 F. Supp. 956 (W.D. Mo. 1982); Highfield Water Co. v. Public Service Commission, 488 F. Supp. 1176 (D. Md. 1980). In the Court's opinion the state has properly directed its instrumentalities to act in a manner which might otherwise be inconsistent with antitrust laws.

The Supreme Court cases also indicate that the state action exemption requires that the state policy must be actively supervised by the State itself. California Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980). Although there may be some question as to

the advisability of requiring state supervision of public entities and the extent of such supervision if required, the Supreme Court, 1977 Term, 92 Harvard L. Rev. 57, 283-284, the Court is of the opinion that the supervision requirement is satisfied in this instance by Iowa Code Sections 455 B.4, 455B.5, 455B.77, 455B.78, 455B.79, 455B.80 and 455B.83, together with the provisions of Chapters 28E and 28F and the general auditing provisions of the Code applicable to political subdivisions.

The Court therefore concludes that the defendants have established that the state action exemption from the application of the antitrust laws applies and that judgment should be entered in favor of the defendants and against the plaintiff for the costs of this case.

IT IS SO ORDERED.

Signed this 10th day of December, 1982.

/s/
W. C. STUART, CHIEF JUDGE
SOUTHERN DISTRICT OF IOWA.

CHAPTER 28E
JOINT EXERCISE OF GOVERNMENTAL POWERS

28E.1 Purpose. The purpose of this chapter is to permit state and local governments in Iowa to make efficient use of their powers by enabling them to provide joint services and facilities with other agencies and to co-operate in other ways of mutual advantage. This chapter shall be liberally construed to that end. [C66, 71, 73, 75, 77, 79, §28E.1]

28E.2 Definitions. For the purposes of this chapter, the term "public agency" shall mean any political subdivision of this state; any agency of the state government or of the United States; and any political subdivision of another state. The term "state" shall mean a state of the United States and the District of Columbia. The term "private agency" shall mean an individual and any form of business organization authorized under the laws of this or any other state. [C66, 71, 73, 75, 77, 79, §28E.2]

Referred to in §28F.2, 361.1, 455B.75

28E.3 **Joint exercise of powers.** Any power or powers, privileges or authority exercised or capable of exercise by a public agency of this state may be exercised and enjoyed jointly with any other public agency of any other state or of the United States to the extent that laws of such other state or of the United States permit such joint exercise or enjoyment. Any agency of the state government when acting jointly with any public agency may exercise and enjoy all of the powers, privileges and authority conferred by this chapter upon a public agency. [C66, 71, 73, 75, 77, 79, §28E.3]

28E.4 **Agreement with other agencies.** Any public agency of this state may enter into an agreement with one or more public or private agencies for joint or co-operative action pursuant to the provisions of this chapter, including the creation of a separate entity to carry out the purpose of the agreement. Appropriate action by ordinance, resolution or otherwise pursuant to law of the governing bodies involved shall be necessary before any such agreement may enter into force. [C66, 71, 73, 75, 77, 79, §28E.4]

28E.5 Specifications. Any such agreement shall specify the following:

1. Its duration.

2. The precise organization, composition and nature of any separate legal or administrative entity created thereby together with the powers delegated thereto, provided such entity may be legally created.

3. Its purpose or purposes.

4. The manner of financing the joint or cooperative undertaking and of establishing and maintaining a budget therefor.

5. The permissible method or methods to be employed in accomplishing the partial or complete termination of the agreement and for disposing of property upon such partial or complete termination.

6. Any other necessary and proper matters. [C66, 71, 73, 75, 77, 79, §28E.5]

28E.6 Additional provisions. If the agreement does not establish a separate legal entity to conduct the joint or cooperative undertaking, the agreement shall also include:

1. Provision for an administrator or a joint board responsible for administering the joint or cooperative undertaking. In the case of a joint board, public agencies party to the agreement shall be represented.

2. The manner of acquiring, holding and disposing of real and personal property used in the joint or co-operative undertaking. [C66, 71, 73, 75, 77, 79, §28E.6]

Referred to in §28E.22

28E.7 Obligations not excused. No agreement made pursuant to this chapter shall relieve any public agency of any obligation or responsibility imposed upon it by law except that to the extent of actual and timely performance thereof by a joint board or other legal or administrative entity created by an agreement made hereunder, said performance may be offered in satisfaction of the obligation or responsibility. [C66, 71, 73, 75, 77, 79, §28E.7]

28E.8 Filing and recording. Before entry into force, an agreement made pursuant to this chapter shall be filed with

the secretary of state and recorded with the county recorder. [C66, 71, 73, 75, 77, 79, §28E.8]

28E.9 Status of interstate agreement. If an agreement entered into pursuant to this chapter is between or among one or more public agencies of this state and one or more public agencies of another state or of the United States said agreement shall have the status of an interstate compact. Such agreements shall, before entry into force, be approved by the attorney general who shall determine whether the agreement is in proper form and compatible with the laws of this state.

In any case or controversy involving performance or interpretation thereof or liability thereunder, the public agencies party thereto shall be real parties in interest, and the state may maintain an action to recoup or otherwise make itself whole for any damages or liabilities which it may incur by reason of being joined as a party therein. Such action shall be maintainable against any public agency or agencies whose default, failure of performance, or other conduct caused or

contributed to the incurring of damage or liability by the state. [C66, 71, 73, 75, 77, 79, §28E.9]

28E.10 Approval of statutory officer. If an agreement made pursuant to this chapter shall deal in whole or in part with the provisions or services or facilities with regard to which an officer or agency of the state has constitutional or statutory powers of control, the agreement shall, as a condition precedent to its entry into force, be submitted to the state officer or agency having such power of control and shall be approved or disapproved by him or it as to all matters within his or its jurisdiction. [C66, 71, 73, 75, 77, 79, §28E.10]

28E.11 Agency to furnish aid. Any public agency entering into an agreement pursuant to this chapter may appropriate funds and may sell, lease, give, or otherwise supply the administrative joint board or other legal or administrative entity created to operate the joint or co-operative undertaking by providing such personnel or services therefor as may be

within its legal power to furnish. [C66, 71, 73, 75, 77, 79, §28E.11]

28E.12 Contract with other agencies. Any one or more public agencies may contract with any one or more other public agencies to perform any governmental service, activity, or undertaking which any of the public agencies entering into the contract is authorized by law to perform, provided that such contract shall be authorized by the governing body of each party to the contract. Such contract shall set forth fully the purposes, powers, rights, objectives, and responsibilities of the contracting parties. [C66, 71, 73, 75, 77, 79, §28E.12]

28E.13 Powers are additional to others. The powers granted by this chapter shall be in addition to any specific grant for intergovernmental agreements and contracts. [C66, 71, 73, 75, 77, 79, §28E.13]

28E.14 No limitation on contract. Any contract or agreement authorized by this chapter shall not be limited as to period of existence, except as may be

limited by the agreement or contract itself. [C66, 71, 73, 75, 77, 79, §28E.14]

28E.15 District agency. A planning commission, council of governments or similar organization formed under the provisions of this chapter shall, upon designation as such by the governor, serve as a district, regional or metropolitan agency for comprehensive planning for its area for the purpose of carrying out the functions as defined for such agency by federal, state and local laws and regulations. [C73, 75, 77, 79, §28E.15]

28E.16 Election for bonds. When bonds which require a vote of the people are to be issued for financing joint facilities of a county and one or more cities within the county, pursuant to an agreement made under the authority of this chapter, or pursuant to other provisions of law, the board of supervisors and the council of each city shall arrange for a single election on the question of issuing the bonds, but if the county and the cities are proposing to make separate bond issues, the ballot shall contain separate

questions, one to be voted upon by all voters of the county, and one or more to be voted upon only by the voters of the city which is to make a separate bond issue. [C75, 77, 79, §28E.16]

CHAPTER 28F
JOINT FINANCING OF PUBLIC WORKS AND FACILITIES

28F.1 Scope of chapter. This chapter is intended to provide a means for the joint financing by public agencies of works or facilities useful and necessary for the collection, treatment, purification and disposal in a sanitary manner of liquid and solid waste, sewage, and industrial waste, also water supply systems, swimming pools or golf courses. The provisions of this chapter shall be deemed to apply to the acquisition, construction, reconstruction, ownership, operation, repair, extension or improvement of such works or facilities, by a separate administrative or legal entity created pursuant to chapter 28E. When the legal entity created under this chapter is comprised solely of cities, counties, and sanitary districts established under chapter 358, or any combination thereof, the entity shall be both a corporation and a political subdivision with the name under which it was organized. The legal entity may sue and be sued, contract, acquire and hold real and personal property necessary

for corporate purposes, adopt a corporate seal and alter the same at pleasure, and execute all the powers conferred in this chapter. [C71, 73, 75, 77, 79, §28F.1]

Referred to in § 28F.2, §28F.3

28F.2 Definitions. The terms "public agency", "state", and "private agency" shall have the meanings prescribed by section 28E.2. The term "project" or "projects" shall mean any works or facilities referred to in section 28F.1 and shall include all property real and personal, pertinent thereto or connected with such project or projects, and the existing works or facilities, if any, to which such project or projects are an extension, addition, betterment or improvement. [C71, 73, 75, 77, 79, §28F.2]

28F.3 Revenue bonds. An entity created to carry out an agreement authorizing the joint exercise of those governmental powers enumerated in section 28F.1 shall have power to construct, acquire, own, repair, improve, expand, operate and maintain a project or projects necessary to carry out the purposes of such agreement, and to issue from time to time

revenue bonds payable from the revenues derived from such project or projects, or any combination of such projects, to finance the cost or part of the cost of the acquisition, construction, reconstruction, repair, extension or improvement of such project or projects, including the acquisition for the purposes of such agreement, of any property, real or personal or mixed therefor. The power of the entity to issue revenue bonds shall not be exercised until authorized by resolution duly adopted by each of the public agencies participating in such agreement. Public agencies participating in such an agreement may not withdraw or in any way terminate, amend, or modify in any manner to the detriment of the bondholders said agreement if revenue bonds or obligations issued in anticipation of the issuance of said revenue bonds have been issued and are then outstanding and unpaid as provided for herein. Any revenue bonds for the payment and discharge of which, upon maturity or upon redemption prior to maturity, provision has been made through the setting apart in a reserve fund or special trust account created pursuant to this chapter to insure the payment there-

of, of moneys sufficient for that purpose or through the irrevocable segregation for that purpose in a sinking fund or other fund or trust account of moneys sufficient therefor, shall be deemed to be no longer outstanding and unpaid within the meaning of any provision of this chapter. [C71, 73, 75, 77, 79, §28F.3]

Referred to in §28F.4

28F.4 Use of proceeds--negotiability. Revenue bonds may be issued, as provided in section 28F.3 to provide all or any part of the funds required to finance the cost of the acquisition, construction, reconstruction, repair, extension or improvement of any project or projects or other purposes authorized under this chapter and such cost shall include, but shall not be limited to, administrative expenses, acquisition and construction costs, engineering, fiscal or financial and legal expenses, surveys, plans and specifications, interest during such construction, reconstruction, repair, extension or improvement or acquisition and for one year after completion of such construction, reconstruction, repair,

extension or improvement or after acquisition of the project or projects, initial reserve funds, acquisition of real or personal property, including franchises, and such other costs as are necessary and incidental to the construction, reconstruction, repair, extension or improvement, or acquisition of such project or projects and the financing thereof. Such an entity shall have the power to retain and enter into agreements with engineers, fiscal agents, financial advisers, attorneys, architects or other consultants or advisers for planning, supervision and financing of such project or projects upon such terms and conditions as shall be deemed advisable and in the best interest of the entity. Bonds issued under the provisions of this chapter are declared to be investment securities under the laws of the state of Iowa. [C71, 73, 75, 77, 79, §28F.4]

28F.5 Source of payment--rates and charges, pledge of revenues. Such an entity shall have the power to pledge all or part of the net revenues of a project or projects to the payment of the principal of and interest on the bonds issued

pursuant to this chapter and shall provide by resolution authorizing the issuance of said bonds that such net revenues of the project or projects shall be set apart in a sinking fund for that purpose and kept separate and distinct from all other revenues of the entity. The principal and interest on the bonds so issued shall be secured by a pledge of such net revenues of the project or projects in the manner and to the extent provided in the resolution authorizing the issuance of said bonds.

Such an entity shall have the power to fix, establish and maintain such rates, tolls, fees, rentals or other charges and collect the same from the public agencies participating in the agreement or from private agencies or persons for the payment of the services and facilities provided by said project or projects. Such rates, tolls, fees, rentals or other charges shall be so fixed, established and maintained and revised from time to time whenever necessary as will always provide revenues sufficient to pay the cost of maintaining, repairing and operating the project or projects, to pay the principal

of and interest on the bonds then outstanding which are payable therefrom as the same become due and payable, to provide adequate and sufficient reserves therefor, to provide for replacements, depreciations and necessary extensions and enlargements and to provide a margin of safety for the making of such payments and providing such an entity shall have the further right to pledge to the payment of the bonds issued pursuant to this chapter, in addition to the net revenues of the project or projects pledged therefor, such other moneys that it may have and which are lawfully available therefor.

In order to pay the rates, tolls, fees, rentals or other charges levied against a public agency by an entity for the payment of the services and facilities provided by a project or projects authorized by this chapter, public agencies participating in such an agreement shall have the power by ordinance to fix, establish and maintain, rates or other charges for the use of and the services and facilities rendered by said project or projects. Such rates or charges may be so fixed, established and maintained and

revised from time to time whenever necessary as will always provide such public agencies with sufficient revenue to pay the rates, tolls, fees, rentals or other charges levied against it by the entity for the payments of the services and facilities provided by said project or projects. All such rates or charges to be paid by the owners of real property, if not paid as by the ordinance provided, when due, shall constitute a lien upon such real property served by such project or projects, and shall be collected in the same manner as general taxes. [C71, 73, 75, 77, 79, §28F.5]

Referred to in §28F.6

28F.6 Bonds not debts of the public agencies. The principal of and interest on the bonds issued by an entity under the provisions of this chapter shall be payable solely from and secured by the net revenues of the project or projects and from other funds of the entity lawfully available therefor as provided in section 28F.5 and said bonds shall not in any respect be a general obligation of any public agency participating in said entity nor shall the entity or any public agency

participating in said entity be in any manner liable by reason of such net revenues or other funds being insufficient to pay said bonds. All bonds issued by the entity shall contain a recital on their face that neither the payment of the principal nor any part thereof nor any interest thereof constitutes a debt, liability or obligation of any of the public agencies participating in the agreement creating such entity or of the entity itself, except that the entity shall be liable for the payment of such bonds from the net revenues derived from the project or projects and from the other moneys lawfully available therefor and pledged thereto pursuant to the provisions of the resolution which may be adopted at the same meeting at which it was introduced by a majority of the members of the governing body of the entity. The terms, conditions and provisions for the authorization, issuance, sale, and security of said bonds and of the holders thereof shall be set forth in said resolution. [C71, 73, 75, 77, 79, §28F.6]

28F.7 Operation of project. Such an entity shall operate, maintain and pre-

serve the project or projects in good repair and working order, and shall operate the project or projects in an efficient and economical manner, provided, however, that the entity may lease or rent the project or projects or any part thereof, or otherwise provide for the operation of the project or projects or any part thereof in such manner and upon such terms as the governing body of the entity shall direct. [C71, 73, 75, 77, 79, §28F.7]

28F.8 Details of revenue bonds. Revenue bonds issued pursuant to the provisions of this chapter shall bear interest at a rate or rates not exceeding that permitted by chapter 74A, may be in one or more series, may bear such date or dates, may mature at such time or times not exceeding forty years from their respective dates, may be payable in such medium of payment, at such place or places within the state, may carry such registration privileges, may be subject to such terms of prior redemption, with or without premium, may be executed in such manner, may contain such terms, covenants and conditions, and may be in such form otherwise, as such resolution or subsequent

resolutions shall provide. [C71, 73, 75, 77, 79, §28F.8; 68GA, ch 1025, §17]

28F.9 Issuance of bond anticipation notes. Such an entity shall have the power, at any time and from time to time after the issuance of bonds thereof shall have been authorized, to borrow money for the purposes for which such bonds are to be issued in anticipation of the receipt of the proceeds of the sale of such bonds and within the authorized maximum amount of such bond issue. Any such loan shall be paid within three years after the date of the initial loan. Bond anticipation notes shall be issued for all moneys so borrowed under the provisions of this section, and such notes may be renewed from time to time, but all such renewal notes shall mature within the time above limited for the payment of the initial loan. Such notes shall be authorized by resolution of the governing body of the entity and shall be in such denomination or denominations, shall bear interest at such rate or rates not exceeding the maximum rate permitted by the resolution authorizing the issuance of the bonds, shall be in such form and shall be

executed in such manner, all as such entity shall prescribe. If such notes shall be renewal notes, they may be exchanged for notes then outstanding on such terms as the governing body of the entity shall determine. The governing body of the entity may, in its discretion, retire any such notes from the revenues derived from the project or projects or from such other moneys of the entity which are lawfully available therefor or from a combination of each, in lieu of retiring them by means of bond proceeds, provided, however, that before the retirement of such notes by any means other than the issuance of bonds it shall amend or repeal the resolution authorizing the issuance of the bonds in anticipation of the proceeds of the sale of which such notes shall have been issued so as to reduce the authorized amount of the bond issue by the amount of the notes so retired. Such amendatory or repealing resolution shall take effect upon its passage. [C71, 73, 75, 77, 79, §28F.9]

28F.10 **Refunding bonds.** Refunding bonds may be issued by an entity in a principal amount sufficient to provvide

funds for the payment (including premium, if any) of bonds issued by said entity pursuant to the provisions of this chapter to be refunded thereby and the interest thereon and in addition for the payment of all expenses incident to the calling, retiring, or paying of such outstanding bonds to be refunded, such refunding bonds may also finance the construction of a project or projects authorized by this chapter or the improvement, addition, betterment or extension of an existing project or projects so authorized. Said refunding bonds shall not be issued to refund the principal of and interest on any bonds to be refunded unless such bonds mature or are redeemable under their terms within ten years from the date of delivery of the refunding bonds. The proceeds of said refunding bonds to be used for the payment of the principal of, interest on and redemption premiums, if any, on said bonds to be refunded which will not be due and payable immediately shall be deposited in trust for the sole purpose of making such payments in a bank or trust company within the state. Any moneys in such trust fund, prior to the date such funds will be needed for the payment of such

principal of, interest on and redemption premiums, if any, of such outstanding bonds to be refunded, may be invested or reinvested as provided in the resolution authorizing and refunding bonds. Refunding bonds shall be issued in the same manner and detail as revenue bonds herein authorized. [C71, 73, 75, 77, 79, §28F.10]

28F.11 **Eminent domain.** Any public agency participating in an agreement authorizing the joint exercise of governmental powers pursuant to this chapter may exercise its powers of eminent domain to acquire interests in property, under provisions of law then in effect and applicable to such public agency, for the use of the entity created to carry out such agreement. Any interests in property so acquired shall be deemed acquired for a public purpose of the condemning public agency, and the payment of the costs of such acquisition may be made pursuant to such agreement or to any separate agreement between or among said public agency and such entity or the other public agencies participating in such entity or any of them. Upon payment of such costs,

any property so acquired shall be and become the property of the entity. [C71, 73, 75, 77, 79, §28F.11]

28F.12 Additional powers of the entity. If the entity is comprised solely of cities, counties, and sanitary districts established under chapter 358 or any combination thereof, the entity shall have in addition to all the powers enumerated in this chapter, the powers which a county has with respect to solid waste disposal projects referred to in section 332.44 despite any contrary provisions of this chapter. [C77, 79, §28F.12]

CHAPTER 455B
ENVIRONMENTAL QUALITY

DIVISION IV
SOLID WASTE DISPOSAL
PART 1
SOLID WASTE

455B.75 Definitions. As used in this part 1 of division IV, unless the context clearly indicates a contrary intent:

1. "Public agency" means a public agency as defined in section 28E.2.

2. "Private agency" means a private agency as defined in section 28E.2.

3. "Sanitary disposal project" means all facilities and appurtenances including all real and personal property connected with such facilities, which are acquired, purchased, constructed, reconstructed, equipped, improved, extended, maintained, or operated to facilitate the final disposition of solid waste without creating a significant hazard to the public health or safety, and which are approved by the executive director.

4. "Solid waste" means garbage, refuse, rubbish, and other similar

discarded solid or semisolid materials, including but not limited to such materials resulting from industrial, commercial, agricultural, and domestic activities. Solid waste may include vehicles as defined by section 321.1, subsection 1. Nothing herein shall be construed as prohibiting the use of dirt, stone, brick, or similar inorganic material for fill landscaping, excavation or grading at places other than a sanitary disposal.

5. "Resource recovery system" means the recovery and separation of ferrous metals and nonferrous metals and glass and aluminum and the preparation and burning of solid waste as fuel for the production of electricity. [C71, §406.2; C73, 75, 77, 79, §455B.75, 68GA, ch 1148, §41]

Referred to in §332.44, 346.23

455B.76 Duty of cities and counties. Every city and county of this state shall provide for the establishment and operation of a sanitary disposal project for final disposal of solid waste by its residents no later than July 1, 1975. Sanitary disposal projects may be established either separately or through

co-operative efforts for the joint use of the participating public agencies as provided by law.

Cities and counties may execute with public and private agencies contracts, leases, or other necessary instruments, purchase land and do all things necessary not prohibited by law for the collection of solid waste, establishment and operation of sanitary disposal projects, and general administration of the same. Any agreement executed with a private agency for the operation of a sanitary disposal project shall provide for the posting of a sufficient surety bond by the private agency conditioned upon the faithful performance of the agreement. [C71, §406.3; C73, 75, 77, 79, §455B.76]

455B.77 Administrator's duties. The executive director shall administer the provisions of this part 1 of division IV subject to the rules established by the commission.

Local boards of health shall co-operate in the enforcement of the provisions of said part and the executive director may seek their aid and delegate administrative duties of the department to

the local boards of health in matters relating to solid waste, refuse disposal plants, and sanitary disposal projects.

The executive director may issue, modify, or deny variances from the rules of the commission. The applicant may appeal the decision of the executive director to the commission. [C71, §406.4; C73, 75, 77, 79, §455B.77; 68GA, ch 1148, §42]

455B.78 Rules established. The commission shall establish rules for the proper administration of the provisions of this part 1 of division IV which shall reflect and accommodate as far as is reasonably possible those current and generally accepted methods and techniques for treatment and disposition of solid waste which will serve the purposes of part 1 of this division which shall take into consideration the factors, including others which it may deem proper, as existing physical conditions, topography, soils and geology, climate, transportation, and land use, the rules including but not limited to rules relating to the establishment and location of sanitary disposal projects, sanitary practices,

inspection of sanitary disposal projects, collection of solid waste, disposal of solid waste, pollution controls, the issuance of permits, approved methods of private disposition of solid waste, the general operation and maintenance of sanitary disposal projects and the implementation of part 1 of this division. Prior to issuance of rules or amendments thereto, the commission shall hold at least one public hearing on the proposed rules or amendments, and shall give notice of the hearing at least thirty days in advance by publishing notice in a newspaper of general circulation in the state. [C71, §406.5; C73, 75, 77, 79, §455B.78; 68GA, ch 1148, §43]

455B.79 Certification of plans by director. The executive director shall certify if disposal projects operated or planned to be opearted by or for cities, counties and those operated by private agencies meet the standards provided for by this part 1 of division IV and the rules of the commission, by issuing a permit for existing disposal projects which fully comply, and for planned sanitary disposal projects whose plans

fully comply, with all provisions of said part and rules issued pursuant thereto. Permits shall be issued for existing disposal sites which have not met all the provisions of said part and rules issued pursuant thereto, if a comprehensive plan for compliance within the time limitations required by said part is developed by a city, county or private agency and is approved by the executive director. Every city or county of this state and every private agency involved in the final disposal of solid waste shall qualify for a permit by the first of July 1975 or be subject to such legal actions authorized by section 455B.82.

Permits shall be issued without fee by the executive director or at his or her direction, by a local board of health, for each sanitary disposal project operated in this state. Such permits shall be issued in the name of the city or county or, where applicable, in the name of the public or private agency operating such project. Each sanitary disposal project shall be inspected annually by the department or a local board of health. The permits issued pursuant to this section shall be in addition to any other

licenses, permits or variances authorized or required by law, including, but not limited to, the provisions of chapter 358A. A permit may be suspended or revoked by the executive director if a sanitary disposal project is found not to meet the requirements of the provisions of part 1 of this division or rules issued under part 1 of this division. The suspension or revocation of a permit may be appealed to the commission. [C71, §406.6; C73, 75, 77, 79, §455B.79; 68GA, ch 1148, §44]

455B.80 Plans filed. Every city, county and every private agency operating or planning to operate a sanitary disposal project shall file with the executive director a plan detailing the method by which the city, county or private agency will comply with the provisions of this part 1 of division IV. The executive director shall review each plan submitted and may reject, suggest modification, or approve the proposed plan. The executive director shall aid in the development of plans for compliance with the provisions of said part. The executive director shall make available to each city, county

and private agency appropriate forms for the submission of plans and may hold hearings for the purpose of implementing the provisions of said part. The executive director and governmental agencies with primary responsibility for the development and conservation of energy resources shall provide research and assitance, when cities and counties operating or planning to operate sanitary disposal projects request aid in planning and implementing resource recovery systems. [C71, §406.7; C73, 75, 77, 79, §455B.80]

455B.81 Tax levy. The board of supervisors of any county may, in lieu of the levy authorized by section 332.32, annually levy a tax not to exceed six and three-fourths cents per thousand dollars of assessed value of taxable property in the county outside the incorporated limits of any city for the purpose of planning a sanitary disposal project or of paying the interest and principal of bonds issued pursuant to the provisions of section 346.23 as they become due. The levy authorized by this section shall be the only levy that the board of supervisors

may authorize for the purpose of this section, notwithstanding the provisions of section 346.11 or any other provision of law. [C71, §406.8; C73, 75, 77, 79, §455E.81]

Referred to in §24.37, 346.23

455B.82 Dumping--where prohibited.

1. It shall be unlawful for any private agency or public agency to dump or deposit or permit the dumping or depositing of any solid waste at any place other than a sanitary disposal project approved by the executive director. This section shall not prohibit a private agency or public agency from dumping or depositing solid waste resulting from its own residential, farming, manufacturing, mining or commercial activities on land owned or leased by it if the action does not violate any statute of this state or rules promulgated by the commission or local boards of health, or local ordinances. The executive director may issue temporary permits for dumping or disposal of solid waste at disposal sites for which an application for a permit to operate a sanitary disposal project has been made

and which have not met all of the requirements of part 1 of this division and the rules adopted by the commission if a compliance schedule has been submitted by the applicant specifying how and when the applicant will meet the requirements for an operational sanitary disposal project and the executive director determines the public interest will be best served by granting such temporary permit.

2. The executive director may issue any order necessary to secure compliance with or prevent a violation of the provisions of this part 1 of division IV or the rules promulgated pursuant thereto. The attorney general shall, on request of the department, institute any legal proceedings necessary in obtaining compliance with an order of the commission or the executive director or prosecuting any person for a violation of the provisions of said part or rules issued pursuant thereto.

3. Any person who violates any provision of part 1 of this division or any rule or any order promulgated or the conditions of any permit or order issued pursuant to part 1 of this division shall be subject to a civil penalty not to

exceed five hundred dollars for each day of such violation. [C71, §406.9; C73, 75, 77, 79, §455B.82; 68GA, ch 1148, §45]

Referred to in §455B.79

455B.83 **Appeal from order.** Any person aggrieved by an order of the executive director may appeal the order by filing a written notice of appeal with the executive director within thirty days of the issuance of the order. The executive director shall schedule a hearing for the purpose of hearing the arguments of the aggrieved person within thirty days of the filing of the notice of appeal. The hearing may be held before the commission or its designee. A complete record shall be made of the proceedings. The executive director shall issue the findings in writing to the aggrieved person within thirty days of the conclusion of the hearing. Judicial review may be sought of actions of the commission in accordance with the terms of the Iowa administrative procedure Act. Notwithstanding the terms of the Act, petitions for judicial review may be filed in the district court of the county where the acts in issue occurred.

[C71, §406.10; C73, 75, 77, 79, §455B.83; 68GA, ch 1148, §46]

455B.84 Converted to following note:

Modification of rules. Any rule adopted or order issued under chapter 406 of prior Codes by the commissioner of public health or under part 1 of this division by the solid waste disposal commission before January 1, 1981 shall remain effective until modified or rescinded by action of the commission unless the rule is inconsistent or contrary to this part 1 of division IV. See 68Ga, ch 1148, §47

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

No. 83-825

CENTRAL IOWA REFUSE SYSTEMS, INC.

Petitioner,

VS.

DES MOINES METROPOLITAN SOLID WASTE AGENCY, ETC., ET AL,

Respondent.

ANSWER TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT CORRECTLY APPLIED THIS COURT'S STANDARDS FOR IMMUNIZING THE ALLEGEDLY ANTI-COMPETITIVE CONDUCT OF MUNICIPAL AND COUNTY GOVERNMENTS IN PERFORMING ESSENTIAL AND GOVERNMENTAL DUTIES.

II. WHETHER THE EIGHTH CIRCUIT COURT OF APPEALS ERRED IN AFFIRMING THE DECISION OF THE DISTRICT COURT CONCLUDING THAT THE IOWA LEGISLATIVE SCHEME AND THE PROUNCEMENTS OF THE IOWA STATE COURTS DEMONSTRATED A STATE CONTEMPLATION OR COMPREHENSION THAT LOCAL GOVERNMENT UNITS WOULD INITIATE AND OPERATE SOLID WASTE DISPOSAL SITES AS EXCLUSIVE FACILITIES.

III. WHETHER THE EIGHTH CIRCUIT COURT OF APPEALS ERRED IN CONCLUDING THAT THE STATE NEED NOT ACTIVELY SUPERVISE LOCAL GOVERNMENTAL UNITS AS A CONDITION OF ACCORDING STATE ACTION IMMUNITY FOR MUNICIPAL CONDUCT, WHERE THE CHALLENGED CONDUCT CONSISTS OF ESSENTIAL GOVERNMENTAL ACTIVITIES SUCH AS THE DISPOSAL OF SOLID WASTE.

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STATEMENT OF THE CASE

In 1966 the city governments in and around Des Moines, Iowa, became aware of a significant and growing problem concerning disposal of solid waste generated in their communities. The existing open-dump disposal site was simply unable to properly handle the volume of solid waste coming to the dump and the serious sanitation and environmental problems created by the situation. More seriously, the city managers knew that the rate of increase in the volume of solid waste would soon outstrip the local facility's ability to safely dispose of the refuse.

In response to this impending crisis the Respondent-Municipalities began serious study of the problem and consideration of solutions. Engineering consulting firms were retained to perform a study which was funded by a federal grant from the U.S. Public Health Service. The study

recommended that the Municipalities collectively construct and manage a unitary solid waste disposal site which would be designed to accomodate the accelerating volume of solid waste and ameloriate the growing sanitary and environmental problems.

Newly enacted Iowa legislation permitted municipalities, counties and other governmental subdivisions to collectively form agencies, in the exercise of state government powers, to provide necessary and important services. Iowa Code, Section 28E.1 (1981). Companion legislation to Chapter 28E provided that such agencies formed under Chapter 28E would be financed by revenue bonds and that such bonds "...may contain such terms, covenants and conditions, and may be in such form otherwise, as such resolution or subsequent resolutions shall provide." Iowa Code, Section 28F.8 (1981). Other

provisions of Chapter 28F require the joint agency to issue revenue bonds for any necessary financing, enter into agreements with financial advisers and attorneys for planning and supervising the bond issuance, pledge revenues and determine the rates and changes for use of the project, operate the solid waste project in an "efficient and economical" manner, and to subject the bonds to whatever conditions or limitations as are necessary.

However the Iowa legislature was not only considering the methods by which local governmental units could remedy the problems of solid waste disposal; it was also considering the necessity of firm leadership and control by the local governments. In 1970 the legislature enacted statutory requirements that cities and counties must provide for environmentally safe and sanitary disposal of wastes. Iowa Code, Sections 455B.76,

332.44 (1981). These statutes also required the local governmental units to take all necessary steps to arrange for suitable financing in the establishment and operation of solid waste disposal facilities.

Therefore, the Municipalities, under the beneficial provisions of Iowa law, formed the Metropolitan Solid Waste Agency ("Metro") by adoption of an Intergovernmental Agreement and a Solid Waste Disposal Contract. The Agreement essentially created Metro and provided inter alia for financing of the solid waste disposal project and for internal regulation of Metro's members. The Contract established schedules for payment by members to Metro for disposal of solid waste. Since, under the state law, Metro was being established with revenue bonds, and because of the insistence of Metro's bond consultants and lawyers, the Contract

also provided that all member governmental units would use the Metro facility for disposal of solid wastes collected from their communities and that none of the members would participate in or operate a solid waste disposal facility which would compete with Metro. These exclusivity provisions were required by Metro's bond consultants because it was their opinion, and the opinion of bond counsel, that the bonds would be unmarketable if the revenue stream could not be guaranteed. Moreover, without an assurance of revenues, the Municipalities could become liable for any default of payment under the bonds in contravention of state law. The bonds were duly marketed and Metro planned, built and managed a modern and efficient solid waste landfill.

On two occasions the Iowa courts considered challenges to the Metro operation. A taxpayer's suit was filed

claiming that the joint agency and financing provisions in Chapters 28E and 28F were unconstitutional as an improper delegation of legislative power to the Municipalities and that the issuance of the revenue bonds could result in the imposition of a general tax upon property owners if the agency's exclusive agreements fail to result in the repayment of the bond issue. The Iowa Supreme Court, in Goreham v. Des Moines Metro Area Solid Waste Agency, 179 N.W.2d 449 (Iowa 1979), held that the state could properly delegate certain legislative functions to the agency and that the municipal members to the Metro Agreement and Contract could not withdraw from the compact until all the bonds had been repaid. According to the court, the revenue bonds did not impose additional burdens upon municipal taxpayers because the bonds would be retired by the revenues generated through exclusive operation of the Metro facilities.

Subsequently, in 1974, the Polk County District Court, in a declaratory judgment action to construe the exclusivity provisions in the Contract, held that all municipality members of Metro must deposit all solid waste at the Metro facility until the bonds were retired. The Municipalities subsequently passed ordinances concerning solid waste collection and disposal and these ordinances generally require persons collecting and hauling solid waste to deposit waste at the Metro facility.

The Petitioner, by and through its president and chief shareholder, has operated waste collection and disposal services since the early 1960's. CIRS operated a landfill in Mason County from 1975 to September 1980. During that time CIRS was cited for fifteen (15) violations by the State, and its license was ultimately revoked for a period of time.

In January of 1979, CIRS filed this antitrust action claiming that the

exclusivity provisions in the Contract and the joint ownership of the landfill site by the Municipalities are restraints of trade, a monopoly and an attempt to monopolize trade or commerce. The United States District Court for the Southern District of Iowa dismissed the complaint, holding that the legislative scheme in Iowa evidenced a contemplation by the state legislative that the Metro facility would be operated as the exclusive landfill in the central Iowa area. Moreover, the district court also concluded that the state had actively supervised the conduct of the Municipalities and the operation of the Metro and therefore the Municipalities' actions were immune from antitrust attack under the state action doctrine.

The Eighth Circuit Court of Appeals, in a thorough opinion, affirmed the district court's conclusion that the legislative scheme and the interpretations of the state

courts evidenced a state comprehension that the Metro would be managed exclusively and that the evidence permitted a reasonable inference of a "clearly articulated and affirmatively expressed state policy" to displace competition in the market for solid waste disposal service. However, the appellate court also held that where local governmental units, rather than private parties acting pursuant to the requirement of state law, are charged with antitrust violations, the local governmental units need not demonstrate active state supervision to find immunity under the state action doctrine.

I. THE LOWER COURT CORRECTLY CONSTRUED AND APPLIED THIS COURT'S STANDARDS FOR IMMUNIZING ALLEGEDLY ANTICOMPETITIVE CONDUCT BY MUNICIPAL GOVERNMENTS FROM THE FEDERAL ANTITRUST LAWS.

The gravaman of CIRS' Petition for a Writ of Certiorari submits that the lower courts misapplied this Court's standards on the state action doctrine and the immunity

of local and municipal governments from the reach of the federal antitrust laws. However, careful consideration of the holdings and opinions of the district court and appellate court in this case compels the conclusion that those courts both understood and correctly applied this Court's rulings. Moreover, the decisions of the lower courts in this case are consistent with decisions of other circuits on the issue of state action immunity for municipal operation of essential and governmental facilities and services. Finally, the decisions of the lower courts are fully consistent with this Court's evolving policy concerning the application of the federal antitrust laws to the performance of essential governmental functions and duties by local governmental units.

Since 1978 this Court has considered two cases concerning the extent to which

local government units will be immune from suits under the federal antitrust laws. Community Communications Co., Inc. v. City of Boulder, 455 U.S. 40 (1982); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978). In those cases the Court held that municipal governments did not have any blanket immunity from the antitrust laws, but could be exempt where the allegedly anticompetitive conduct is "in furtherance or implementation of a clearly articulated and affirmatively expressed state policy." Community Communications Co., Inc. v. City of Boulder, 455 U.S. at 52. However, the Court was careful to point out that immunity for municipal governments is different than immunity for private parties acting pursuant to state commands, because a municipality need not "point to a specific, detailed legislative authorization before it may properly assert

a Parker defense"; rather, immunity is proper where the state authorized the city to operate in a particular area and the legislature "contemplated the kind of action complained of." City of Lafayette, 435 U.S. at 415. In this case the lower courts correctly applied these standards to find that the Iowa legislature, in promulgating the extensive and detailed legislation concerning joint and collaborative municipal action to solve significant sanitation and environmental problems, must have contemplated that facilities like Metro would be operated exclusively.

The lower courts in this case made specific and justifiable conclusions from the record presented to them. Specifically, those courts found that the municipalities were performing essential and important governmental functions in providing for the disposal of solid waste

in their communities and that the state had imposed on them the duty to safely and efficiently dispose of solid waste. Second, the state legislated comprehensively with the purpose of ensuring that municipal governments had sufficient power and direction in performing these essential functions. Third, the courts concluded that the realities of the municipal bond market in the early 1970's required that bond-issuing municipalities guarantee a source and stream of revenues sufficient to retire the bonds, or the bonds would simply be unmarketable. Fourth, the federal courts believed that an Iowa judicial interpretations that the statutory scheme and the exclusivity provisions in the Agreement and Contract were related to state objectives and commands and that those interpretations should be given some weight. These considerations justified the

federal courts conclusion in this case that the Iowa legislature had contemplated the issue of exclusive municipal control of solid waste disposal for the related reasons of safety and environmental concerns and the financial requirement that a source of revenues be guaranteed for repayment of the bonds.

The courts' decisions in this case are consistent with the decisions of other circuits which have considered the difficult issue of when a state "contemplates" or "comprehends" that a municipal government will engage in anticompetitive conduct in accomplishing an essential governmental duty. The courts have held that a legislative contemplation that a municipality will engage in anticompetitive conduct may be found from a comprehensive and detailed statutory arrangement,[1] or where the

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[1] Gold Cross Ambulance & Transfer v. City of Kansas City, 705 F.2d 1005 (8th Cir. 1983); Town of Hallie v. City of Eau Claire, 700 F.2d 376 (7th Cir. 1983).

allegedly anticompetitive conduct bears a causal and reasonably connected relationship with legitimate municipal conduct,[2] or where such an inference is permissible for a statute which is inherently anticompetitive.[3]

The Ninth Circuit Court of Appeals decision in Parks v. Watson, 716 F.2d 646 (1983) is not to the contrary. The Parks case involved the use of geothermal wells for residential heating and the Oregon statutory arrangement permitted public ownership of the geothermal resources, but did not impose any affirmative duties on the municipal governments to develop or regulate the area. Unlike the disposal of

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[2]Pueblo Aircraft Service v. City of Pueblo, 679 F.2d 805 (10th Cir. 1982).

[3]Town of Hallie v. City of Eau Claire, 700 F.2d 376 (7th Cir. 1983).

solid waste materials in Iowa, the Oregon communities were permitted to develop geothermal heating facilities and could issue either general obligation or revenue bonds to accomplish the task if they chose to enter the market. Such discretionary governmental involvement is simply not evident in the area of sewerage and solid waste disposal. The safely-engineered and environmentally-controlled disposal of solid waste materials is an essential governmental function in Iowa and is not merely an area of possible and discretionary activity by local governmental units.

In this case the lower courts found that the Iowa legislature must have contemplated that the Metro would be operated as an exclusive landfill in the community served because of the closely-connected and obvious requirement that the revenue bonds have an exclusive

source of repayment and because the comprehensive and detailed statutory arrangement evidenced a legislative understanding that open and robust competition would not exist in this area. The courts' decisions are fully consistent with the decisions of this Court in City of Lafayette and City of Boulder and with the decisions of other circuit courts which have considered the issue of legislative contemplation of essential governmental services.

In its Petition for Writ of Certiorari the Petitioner makes the disingenuous argument that the decisions of the federal district court and court of appeals in this case have rendered meaningless this Court's rulings and have given municipalities an open license to engage in anticompetitive conduct. (Petition, p. 21). These contentions, coming as they do from a party with a chronic and unbroken history of

violations of sanitation and environmental requirements for the operation of landfills, fail to recognize the compromise crafted by the lower courts between local government's interest in effective, safe and fiscally responsible solid waste disposal and the encouragement of private enterprises and competition as national economic objectives. The lower courts approached the difficult issue of discerning state legislative contemplation and state policy with integrity and sensitivity for local perogative, and their conclusion that this issue must be resolved on a case-by-case basis by consideration of a number of factors is consistent with this Court's approach to other complex areas of federal-state relations under the Tenth Amendment. See, e.g., Hodel v. Virginia Surface Mining and Reclamation Assoc., Inc., 452 U.S. 264 (1981); National League of Cities v. Usery, 426 U.S. 833 (1976).

II. ACTIVE STATE SUPERVISION OF MUNICIPAL CONDUCT IS NOT REQUIRED WHERE MUNICIPALITY PERFORMING NECESSARY AND ESSENTIAL GOVERNMENTAL FUNCTIONS.

The Petitioner also contends that review by this Court is appropriate because the courts below erred in concluding that immunity under the state action doctrine does not require that a municipality demonstrate active state supervision over the allegedly anticompetitive conduct. However, the circuit courts which have carefully examined this issue have concluded that active state supervision is not required where a municipal government[4] is engaging in governmental

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[4]The dual requirements of an affirmatively expressed state policy and active state supervision are appropriate standards for adjudging the behavior of private parties allegedly acting pursuant to state requirements. California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980). The second requirement of active state supervision is not particularly helpful in examining the activities of municipal governments performing essential, governmental activities.

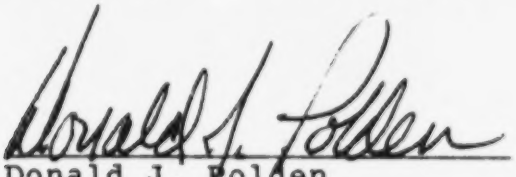
activities traditionally performed by local and municipal government units. Gold Cross Ambulance & Transfer v. City of Kansas City, 705 F.2d 1005 (18th Cir. 1983); Town of Hallie v. City of Eau Claire, 700 F.2d 376 (7th Cir. 1983); Cf. Corey v. Look, 641 F.2d 32 (1st Cir. 1981) (court applied both standards under Midcal case to nonessential activity of operating parking lots without any analysis of the active supervision requirement). Therefore, the Eighth Circuit Court of Appeals was correct in concluding that active state supervision is not required in a case such as this, and there are no compelling reasons for this Court's review of that conclusion.

CONCLUSION

For the reasons discussed above, particularly the clear conformity of the appellate court's decision and reasoning to prior decisions of this Court and the decisions of other appellate courts in

factually similar cases, the Petition for Writ of Certiorari should be overruled and a writ not issued.

Respectfully submitted,



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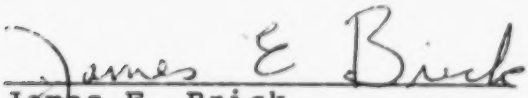

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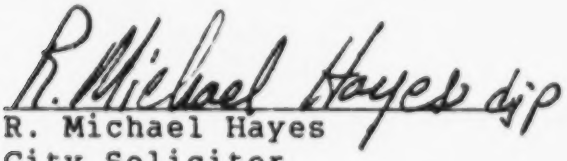

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